CHIEF JUSTICE ROGER B. TANEY

Legal and Historical Status

of the

Dred Scott Decision

A History of the Case and an Examination of the Opinion Delivered by the Supreme Court of the United States, March 6, 1857.

By

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A bargain cannot be broken on one side and still bind the other. I am for the Constitution, and the whole Constitution.—Daniel Webster of Massachusetts, speech in 1851.

Qui statuit aliquid parte inaudita altera,
Aequum licet statuerit, haud aequus fuit.
—Seneca.

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ERRATA

Page	Line			
5	19:	Brice	should be	Bryce.
7	8:	unauthorative	" "	unauthoritative.
11	12:	purturbations	" "	perturbations.
13	30:	Brice	" "	Bryce.
19	5:	ships	" "	shops.
30	27:	Missouri	" "	Mississippi.
57	22:	accured	" "	accused.
72	13:	hed	" "	had.
73	27:	after "treated" interline "him."		
103	6:	a obiter	should be	an obiter.
146	8:	eight	" "	eighth.
147	27:	Is so	" "	If so.
150	28:	mullatoes	" "	mulattoes.
160	11:	Pickney	" "	Pinckney.
181	18:	Garfield	" "	Hayes.
183	8:	was	" "	were.
190	9:	in	" "	is.
191	14:	two-thirds	" "	three-fourths.
191	35:	two-thirds	" "	three-fourths.
193	1:	omit "the" before its.		
196	7:	stranger	should be	stronger.
198	32:	convert	" "	covert.
201	25:	ebolutions	" "	ebullitions.
221	11:	Pickney	" "	Pinckney.

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FOUNDATION PRECEDENTS.

In 1782 Judge Wythe of the supreme court of Virginia, with reference to the constitution of that State, speaking for the court said:

"Nay more, if the whole legislature, an event to be deprecated, should attempt to overlap the bounds prescribed to them by the people, I, in administering the public justice of the country, will meet the united powers at my seat in this tribunal; and, pointing to the constitution, will say to them, here is the limit of your authority, and hither shall you go, but no further."

This is the first reported case in the United States where the nullity of an unconstitutional law was discussed before a judicial tribunal. *It is the first great American precedent.* See 4 Call's Virginia Reports, page 5.

In 1803 the Supreme Court of the United States held that, "The powers of the legislature (Congress) are defined and limited; and, that those limits might not be mistaken or forgotten, the Constitution is written."

This is the first instance in which an act of Congress was held unconstitutional, and the first in history wherein a court called in question an act of a national legislature. See Marbury vs. Madison, 1 Cranch, United States Reports, 162.

The American people have since believed that the principles thus announced and since followed are essential to their rights and liberty.

OBJECTS OF THIS WORK.

The Dred Scott Case, decided by the Supreme Court of the United States on March 6, 1857, involved the most fundamental principles of government. These principles were the issues: slavery was only one of many conditions some of which sooner or later would have presented for adjudication these questions. The principles involved, being applicable much beyond, apart from, and outside and irrespective of that which brought them into issue in this case, survived; slavery shortly perished, just as in reasonable time it would have done without the violence which accompanied its going. Because of the survival of these questions of government, a study of this case is of great practical value; and a history of the case and of its times, a correct estimate of the opinion and decision of the court, a truthful picture of the subsequent conditions, are indispensable to a correct understanding of the most crucial period in American history.

As to the importance of the case and its world-famous decision eminent writers are agreed. For instance: Honorable James Bryce, English diplomat, distinguished statesman, and thorough historian, declares that the decision "did much to precipitate the Civil War." Doctor H. von Holst, late professor at Frieburg, Germany, widely accepted as an authority upon American history, pronounces this case as of "eminent historical importance;" and in his extensive political and constitutional history of this country he devotes twenty-four consecutive pages to its study. Francis Newton Thorpe, in his recent *Constitutional History of the United States,* says: "The questions involved went to the root of our institutions." James Ford Rhodes affirms: "The opinion of the court was a fact of tremendous import." Alexander Johnston, long professor at

Princeton University, holds: "One of the most important cases ever decided in the United States." The late Mr. Justice Miller, while associate justice of the Supreme Court of the United States, pronounced the Dred Scott Case and Prigg vs. Pennsylvania "perhaps the two most important decisions of the Supreme Court that have been delivered in many years," adding, excepting the latter case: "The Dred Scott decision overshadowed all others on the subject, in the importance of the principles which it laid down, and in the immense influence it had upon the history of the country." August 2, 1859, Alexander H. Stephens wrote: "On the principles of the Dred Scott decision depended . . . in all probability the destiny of this country."

When the court, concurring in the opinion written by the Chief Justice, as a fundamental premise upon which it rested its decision, applied to Congress when legislating for the Louisiana Purchase territory, a part of the United States and at the time of the legislation yet in a territorial condition, the restraints and limitations found in the Constitution of the United States, holding that Congress in legislating for a Territory could exercise no power not conferred by that instrument, those who followed Webster and Benton, the surviving enemies of the Calhoun school, broke forth in rage nothing short of the nullification of Federal power. When in its *construction* of the Constitution the opinion of the court, as written by Chief Justice Taney of Maryland, adjudged the Missouri Compromise law unconstitutional, indignation became open rebellion. The Republican party, the abolitionists, and Northern States repudiated the decision, and declared that they would not be bound by the principles it laid down, and that in subsequent legislation Congress should and would treat the decision as a nullity.

This repudiation professed to rest upon the ground that the judgment of the court, at least as to the constitutionality of the Missouri Compromise law, rested upon an *obiter dictum,* and was therefore not law; and that the court in its judgment

as to the citizenship of Scott, which depended upon the meaning of the word citizen as used in that clause in the Constitution conferring upon Federal courts jurisdiction over suits between citizens of different States, though not dictum was in vital error in its arguments and conclusions. Not a few added to the popular error by going so far as to declare that the opinion read by Taney was not the judicial opinion of the court, but his individual and therefore unauthorative utterance.

In February, 1865, it was said in the *Atlantic Monthly* that Taney "will most likely, after the traitor leaders, be held in infamous remembrance;" and that he covered "the most glorious pages of his country's history with infamy, and insulted the virtue and intelligence of the civilized world." Sumner said that the decision "gave conspirators new confidence." On March 26, 1857, the New York *Independent* pronounced the opinion "a treasonable attempt" to alter the law. The same spirit of rebellion and insubordination developed widely throughout the North and West. In later days the bitterness is scarcely less pronounced. For instance: Hampton L. Carson, a distinguished member of the Philadelphia bar and a well-known author, says that the decision "was a blunder—a blunder worse than a crime;" Henry W. Elson declares: "The great body of the people of the North, however, condemned this unjust decision of the court;" while Albert Bushnell Hart believes that the "decision was so forced and so contrary to historical facts that the Republican leaders declared that they were not bound by it;" and James Ford Rhodes says that Taney's argument is "inhuman" and "a great piece of specious reasoning," "outraging precedent, history and justice." With one accord these historians acclaim the judgment to be resting upon an *obiter dictum*—some say *dicta*.

That these charges, found in one form or another in histories and encyclopaedias down to the latest, are without foundation in law or history; that the decision of each question was valid and binding law; that the repudiation became the most

pronounced nullification, more dangerous and more far-reaching than anything of the kind ever found in the South, leading to conditions destructive of domestic peace, personal security and happiness in the South, and because of the unpardonable errors upon which it rested inexcusable,—it is my purpose to establish by the evidence I present in this work.

I have endeavored to present the facts and the law not in the nature of a lawyer's brief but in such impartial and judicial fulness as that the lawyer and the student generally may have an authoritative source-book upon the history and the law of this great case. Incidentally I have tried to make the discussion of some practical value to the busy member of the bar. More particularly is this true of the examination of the jurisdiction of Federal courts, the rules of pleas in abatement arising on writs of error, the nature of *obiter dicta,* due process of law, and the distinction between questions judicial and political. In discussing the constitutionality of the Missouri Compromise I have given what I believe to be both a practical and timely consideration of the powers of Congress to legislate for a Territory, involving the application of the Constitution to acquired territory, such as Porto Rico or the Philippines, which bring us questions not different from those which the territory of the Louisiana Purchase presented.

Because both interesting and necessary a careful history of the case and a survey of the fundamental axioms of law and government upon which it rests, precede the examination of the questions which the record presented to the court. That the student might have a comprehensive survey of the essentials both of the opinion of the court and of the dissenting opinions, together with the applicable law and the historical facts, in a convenient compass, immense labor has been necessary. However, in view of the universally recognized importance of the case and the indictment here brought against history as now generally written, the seriousness of the examination fully justifies the labor.

I.

AMERICAN COURTS.

To comprehend the Dred Scott Case and the history which centers about its famous decision, it is very important that we keep before the mind the distinction between the courts of a State and the courts of the United States. The peculiar relations between the States and the Federal Government give us a dual judicial system, each having its well-defined field of jurisdiction.

At this time we need not enter the mooted question as to how the Federal Government was created. What is the Federal Government, the rules by which its powers are determined, —especially its legislative and judicial powers,—and what rights look to the Federal Government and what to the State government for protection, are the questions that must be settled in order that we may grasp the true bearing of the Dred Scott decision upon the history of this country.

Whether the Federal Government is the creature of the States in their independent and sovereign capacities or of "the people acting as sovereigns of the whole country," it is certain that the creators were competent to invest the general government with all the powers which "they might deem proper and necessary; and to extend or restrain these powers according to their own good pleasure," as expressed by the Supreme Court in 1816.[1] Whether the Constitution be "neither wholly National nor wholly Federal," as suggested by Madison in the *Federalist* (No. 39), it is certain that the basal principle upon which the government—the American government with its dual form, State and Federal—has been preserved and main-

[1] Martin vs. Hunter, 1 Wheat. 324.

tained is "that there can be no loss of separate and independent autonomy to the States, through their union under the Constitution," and that "the preservation of the States and the maintenance of their governments are as much within the design and care of the Constitution as the preservation of the Union," as said by the same court in 1868,—a time when but for the sober poise of that arm of the government Union would have overshadowed State.[2]

The spheres of these respective governments are equally well-defined and carefully preserved.

"The government of the United States is one of delegated powers alone. Its authority is defined and limited by the Constitution. All powers not granted to it by that instrument are reserved to the States or the people. No rights can be acquired under the Constitution or the laws of the United States, except such as the government of the United States has the authority to grant or secure. All that cannot be so granted or secured are left under the protection of the States."[3]

"The general government and the States, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former in its appropriate sphere is supreme; but the States within the limit of the powers not granted, or, in the language of the tenth amendment, 'reserved' are as independent of the general government as that government within its sphere is independent of the States.[4]

"Within the sphere allotted to them, the co-ordinate branches of the general government revolve, unobstructed by any legitimate exercise of power by the State governments. The powers exclusively given to the Federal Government are limitations upon the State authorities. But, with the exception

[2]Texas vs. White, 7 Wall. 724; also see Downes vs. Bidwell, (1901) 182 U. S. 351.

[3]U. S. vs. Cruikshank, (1875) 92 U. S. 551; Kohl vs. U. S., 91 U. S. 372; McCulloch vs. Maryland, (1819) 4 Wheat. 406; Pacific Ins. Co. vs. Soule, (1868) 7 Wall. 444; Butterfield vs. Stranahan, (1904) 192 U. S. 492.

[4]Collector vs. Day, (1870) 11 Wall. U. S. 124.

of these limitations, the States are supreme; and their sovereignty can be no more invaded by the action of the general government than the action of the State governments can arrest or obstruct the course of the national power."[5]

All branches of the government recognize these definitions, repeatedly announced by our Supreme Court, as clearly setting forth our government, and from the earliest day to this the courts, the legislature and the executive have based their actions upon these principles. That the court has correctly defined the powers of the National Government as thus so long followed, is not now questioned by any authority in this country. Some purturbations occurred on the part of the executive and legislative branches in the great upheaval of 1861 to 1865, but the judiciary and general common sense at length steadied the movement and the great machine moved on none the less strong for the strain.

With our two judicial systems it is readily seen that when any party believes himself aggrieved and regards it necessary to have a court interpose, he must find out in what court, whether in a State court or before a United States tribunal, he may proceed. Now and then such a party may have his option, and may bring his cause of complaint before a certain one of either of these, in which case the jurisdiction is said to be concurrent. Instances of concurrent jurisdiction are not numerous. Having examined the Constitution and laws of Congress pursuant thereto, if an aggrieved party finds he cannot sue in a Federal court, *he may always do so in a State court.* No man, not even a slave, ever had a right to be protected or an injury to redress but that he had some place in one or the other of these American judicial systems where his complaint would be heard and determined according to the laws ordained by the people.

In his action Dred Scott, of course always by his attorneys, asserted that he had certain rights. Therefore it became necessary for the court in which he sought to enforce

[5]Worcester vs. Georgia, (1832) 6 Pet. (U. S.) 570.

his alleged rights to determine as to the correctness of his claim of right to use the forum he sought to enter. Whether he had such rights and whether they were "left under the protection of the State" of Missouri, this being the State in which he claimed his home and his citizenship, or whether the alleged rights depended upon the protection of the Federal Government, were questions which were of first and vital inquiry in both the trial courts and the Supreme Court of the United States, the latter having been reached by appeal.

Hence, with one or two more of the fundamental and basal principles of our government as beacon lights kept well to view, we are prepared to follow the court in the solution of the questions which this great case involved.

One of the most important of these great head-lights is the truth that the Constitution does not change; *courts* cannot change it. In America courts interpret that great instrument as it was meant to be when framed or amended and ratified by the States. "Constitutional provisions do not change," said our Supreme Court in *In re Debs,* in 1895, "but their operation extends to new matters as the modes of business and the habits and the life of the people vary with each succeeding generation. The law of the common carrier is the same today as when transportation on land was by coach and by wagon, and on water by canal boat and sailing vessel, yet in its actual operation it touches and regulates transportation by modes then unknown, the railroad train and the steamship. Just so it is with the grant to the National Government of power over interstate commerce. The Constitution has not changed. The power is the same."[6]

Again and again these truths have been repeated by our courts and by those who administer the affairs of government. They have long been with us axiomatic. In the unchangeable nature of our government lies one of its sources of stability. In the fact that, where factions differ as to its power in a given case, our Supreme Court, the arbiter, seeks to place itself as nearly as possible in the condition of the men who frame

[6] 158 U. S. 591.

the Constitution or any operative amendment thereof, and thus finding its meaning then enforce it as understood when adopted, lies our greatest security. In America the charter of government as written is supreme, and remains the same as when adopted; the power to alter or amend reposes alone with the people of the States.

In the fact that the people of three-fourths of the States, having written a government guide, alone can change it from time to time as conditions demand and that it is supreme until thus changed, lies the chief hope of popular rule. That we have a written guide for all departments of our government, operating within the sphere of the Nation and alike in that of the State in so far as applicable, binding upon the executive, the legislative, and the judicial branches, is one of the happiest birthrights of the American people.

Repeating this great truth, our Supreme Court in deciding Muller vs. Oregon, Feb. 24, 1908, said: "Constitutional questions, it is true, are not settled by even a consensus of public opinion, for it is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative action, and thus gives a permanence and stability to popular government which otherwise would be lacking."[7]

The next great truth which we must bear in mind in our study of this case is, that the Supreme Court of the United States is the sword of popular rule. It is the balance wheel preserving the democracy of America from monarchy or plutocracy. Sovereign power is more nearly expressed and exercised by our Supreme Court than by any other branch or branches of our government. The distinguished Englishman, Mr. James Brice, in his *The American Commonwealth,* has said: "The Supreme Court is the voice of the Constitution;" and Mr. Justice Brewer but announced the settled rule when he said:

"A tribunal which, standing back of legislative and executive officials, could declare what they attempted to do to be of no effect, because in conflict with that organic instrument

[7] 208 U. S. 420.

[the Constitution], was soon recognized as a factor of supreme importance in the nation. And that the Supreme Court was given this power by the Constitution was so clearly shown by Chief Justice Marshall in his opinion in Marbury vs. Madison, 1 Cranch, 137, that no one since has seriously challenged it." And again he said: "Is it too much to say that it is all-important for the well-being of this Republic, that nothing should be done to abridge its [the Supreme Court's] powers or hamper its usefulness? In its stability and permanence is found assurance that popular government will not degenerate into government by the mob; and while it continues an unimpaired factor in our national life the Republic will live, a blessing to its citizens and a light to the world."

Therefore, the interpretation of the Constitution by which the court was guided in deciding the Dred Scott Case was the final and binding law of the land. Final in its operation upon Congress and the Executive; and final until the requisite number of States saw best to amend the great charter, and give it some other force. The States did not so amend, and thus the people ratified the decision, leaving those in opposition to the court's view no recourse except submission, rebellion or, worse, nullification. A great number of those who would not agree with the court chose the dangerous expedient of nullification. For this reason historians too often misrepresent the great opinion and, only in milder terms than formerly, defame the court.

The Supreme Court of the United States is now, as it was when it rendered the Dred Scott decision, composed of nine judges. These are appointed by the President of the United States, and confirmed by the Senate. They serve for life or during good behavior. This court sits in the capitol, in a chamber formerly used by the Senate. One of its members is made Chief Justice and the others are known as associate justices. When the Dred Scott decision was handed down in March, 1857, Roger B. Taney of Maryland was Chief Justice.

Taney inherited slaves, but early in life manumitted them, providing for two who were old and infirm to the day of their death. Always, when a practicing lawyer, he rendered professional aid to slaves seeking the rights of freedom. Once he defended a man charged with inciting slaves to insurrection, and so intense was the feeling that his life was endangered; and, Carson adds, "when pressed with the gravest business, had been known to stop in the streets of Washington to help a negro child home with a pail of water."[8] Neither of the associate justices held slaves; and of the bench four were from States where slavery had ceased more or less to be recognized, while five were from States recognizing the legality of slavery. Of these Justices John McLean of Ohio was appointed in 1829 and served till he died in 1864; James M. Wayne of Georgia served from 1833 to 1867; John Catron of Tennessee was on the bench from 1837 to 1865; Peter V. Daniel of Virginia, from 1841 to 1860, at which time he died; Samuel Nelson of New York, from 1845 to 1872; Robert C. Grier of Pennsylvania, from 1846 to 1869; Benj. R. Curtis of Massachusetts, 1851 to his resignation in 1857; and James A. Campbell of Alabama, from 1853 to 1861, when he resigned.[9]

Judge Campbell, having resigned, threw himself heartily into the service of the Confederate States, serving with distinction. All of the others, it is seen, Judge Daniel having died before secession, remained loyal to the Union, and fought valiently to maintain inviolate the sacred principles of the Constitution during the strain of the war. Judge Curtis, who with McLean dissented in the Dred Scott Case, administered to Lincoln for his unconstitutional so-called emancipation proclamation, the most unanswerable rebuke.

A case having been submitted to the court, five or more being agreed as to the judgment to render therein, one of the number is selected to write out the decision. In doing this he generally gives the reasons for the conclusion, referring to the

[8] Hampton L. Carson, The History of the Supreme Court, vol. 2, 372; Tyler's Memoirs of Taney, 664.

[9] Thorpe, Const. Hist. of U. S., vol. 2, 538; and the many histories of the court.

Constitution, to previous decisions of that court, to the history of the country; and now and then to decisions in England or other countries in so far as they give light and show a common understanding of a given question. This is called the opinion of the court. Those of the court who do not agree in a conclusion reached by the majority, may write an opinion of their own and have it put upon record; and if they do so it is called a dissenting opinion. Dissenting opinions by a minority do not affect the authority or the validity of the majority opinion, *the latter is always the opinion of the court.* A dissenting opinion is for the purpose of preserving the views of the minority and of showing their good faith.

In the Dred Scott decision two of the nine judges dissented, and this is what Mr. Lincoln meant when he talked so often of "a divided court." Each member wrote and had recorded his reasons for dissent from or agreement with Judge Taney. However, decisions where a minority of the court dissents are numerous, some of our best law having been determined by a division of four to five.

There is nothing strange and nothing derogatory to the highest validity in that we find each judge giving some expression as to the logical process by which he reached an agreement with the majority opinion and judgment. Each felt, as judges quite often do, that he could express himself more clearly than could another for him. One of our most reliable law authorities, speaking of judicial opinions in general, says: "While the opinion announces the decision of the court, it does not follow that each member has arrived at his conclusion by the same reasoning or bases it on the same principles.[10]

Our judicial reports abound in cases where members of the court differed as to reasons or grounds, yet concurred in conclusions and opinions. An instance is, Hawaii vs. Mankichi, 190 U. S., 218. Justice White, with whom Justice McKenna agreed, said: "I concur in the meaning of the act [of Con-

[10]26 American and English Enc. Law, 2d ed., 170, and the cases there cited.

gress] as explained in the opinion of the court, and in the main in the reasoning by which that interpretation is elucidated. I prefer, however, to place my concurrence in the judgment upon an additional ground which seems to be more fundamental." And this assent of White and McKenna was necessary to a judicial decision, more so than was the assent of any one of the court to the Chief Justice's opinion in the Scott case, for in the Hawaiian case four of the nine dissented. Yet no one has ever questioned the authority and binding force of the latter decision.

In fact, great numbers of decisions and opinions in cases that have settled far reaching and basal principles have been determined by a *divided court*. In the last few years three famous decisions under the Sherman law, the well-known Insular Cases, the Income Tax Cases, and the Lottery Case, have been decided by five to four.[11] When Lincoln and a furious North, for want of logic, derided the Dred Scott decision, rendered judicial by 7 to 2, they forgot that the world long before them quietly and without derision acquiesced in decisions by divided courts; and today he would be esteemed traitorous who would advocate the nullification of a decision by our Supreme Court though made by the narrow margin of five to four.[12]

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[11]The Nat. Corporation Reporter, 1906, for a specific list.

[12]Decisions of courts of last resort, both in the States and of Federal courts, are reported in bound volumes. Such courts have an official reporter whose business it is to prepare these reports under the supervision of the court. Benjamin C. Howard was such reporter when the Dred Scott Case was decided. He published the opinion in the nineteenth volume of his reports; and therefore lawyers refer to it as "19 Howard." In more recent years the decisions of both State and Federal courts are no longer indicated by the name of the reporter. They are now known as United States reports, Virginia reports, New York Appellate reports, and so on as the case may be.

II.

HISTORY OF THE CASE.

In all history territorial expansion has been accompanied by bitter contests. Bloodshed and cruelty, strategem and unmasked force, shameless diplomatic rascality and dark governmental intrigues cloud the titles to the greater number of the world-political geographic divisions. As westward with an ever widening angle the American people poured in ceaseless streams across rivers, prairies and mountains, man's more savage nature burst forth into similar battle. The varied climate of the States from the bleak hills of northern New England down to tropical Florida and Louisiana, and the variety of natural resources, with intercommunication slow and expensive, determined industries and labor systems, producing antagonistic sectional interests. These natural conditions evolved from a labor system once common to the Union, two systems, and two more antagonistic it would be hard to imagine. Conscience and philanthropy had as little to do with the conversion of the slave system of the North into free-labor, as they have in throttling today monopolistic predatory invasions of vast wealth. Moving down from the North and reaching out from the South, in the days of our continental expansion these antagonistic systems, fundamental and in the vanguard of the two lines of march because of the basal and preëminent nature of labor, disputed with each other for supremacy in our new Territories. The grapple was relentless. The bowie-knife and the Sharps' rifle, the torch and the cutlass left their deep, gore-stained traces.

Having grown into manufacturing and shipping interests, the North found not only that the negro slave had not the

intelligence to do the work of the mills, but that the slave system in the South to which the mills looked for buyers, did not furnish the markets essential to the highest prosperity. The white laborer from the North, having found the mills and ships overcrowded and agriculture unprofitable, shrank from contact with the slave-labor system because it monopolized the labor market and created for the white laborer a social odium. Slave labor placed the white laborer at a serious disadvantage. During its days of economic profit, the slave system, favored by nature, made the South affluent as a section, gave time for culture, the study of government, and the development of courtly qualities inherent in the white race of the South. So the politician of the North found in his southern competitor an able and dangerous obstacle, one both ambitious and competent to rule, and who in the administration of the affairs of government was opposed to government paternalism over the manufacturing interests of the North. Thus the labor system of the South found opposition in the *combined labor, capital and politician of the North.* In this opposition the fanatic and insanely conscientious found a fertile field.

The Constitution of the United States left to each State the right and power to legalize and continue African slave labor. Having been established by the laws of a State, the Federal Government by the Constitution was pledged to protect and return fugitives from the system, such fugitives having escaped beyond the territorial limits of the slave-labor State. Hence the control of a Territory, which rapidly grew to Statehood with power to create or destroy domestic slavery, became important to the slave owner who wished to seek his fortune in the new West, and to the politician, to the white laborer, and to the manufacturer who coveted markets such only as free-labor would open. Thus between the North and the South antagonistic theories of government became constantly more pronounced.

The admission of the State of Missouri in 1820 brought to the front the most astute generals representing these differ-

ent theories of government. Representatives from the North refused to admit the Territory to be known as Missouri as a State until she should by her constitution forbid domestic slavery, notwithstanding her many thousands of slaves recognized by the Federal Government as valuable property. The people of Missouri were clearly entitled to be recognized as a State, and to avoid the injustice threatened by the obstructionists, an adjustment was finally reached, known as the Missouri Compromise, by which the State was admitted, and a provision incorporated into the bill forbidding slavery in that Territory of the Louisiana Purchase outside of Missouri and north of thirty-six degrees and thirty minutes north latitude.

The divergent views of the nature of the Federal Government and of the power of Congress over territory acquired by the United States, differences that had begun to manifest themselves in 1803 when Jefferson acquired the Louisiana Purchase, that became prominent in the dispute over the admission of Missouri, became more pronounced as each further acquisition of territory was made and each time Congress came to discuss or legislate for such domain.

In general propositions from Southern statesmen were charged with having the ulterior purpose of extending slavery for slavery's sake. While, in fact, in the main the issues had intrinsic value, and concerned the very life of the American government, regardless of whether the maintenance of the principles involved would favor either slavery or anti-slavery. Writers of today, as did those who lived through the more strenuous time of our history, too often make the mistake of measuring the contentions of those days by the slavery standard too exclusively. Had the views of those who, in the main, were anti-slavery because of geography and climate, prevailed, the most happy safeguard of what we call the American government would long since have perished.

After the battle over Missouri with its resulting Missouri Compromise law, the request of President Polk in his message of August 8, 1846, that Congress furnish money to

adjust the boundary between Mexico and the United States by the purchase of certain Mexican territories outside of Texas, brought the antagonistic forces again to sharp issues. David Wilmot, a Democrat from Pennsylvania, offered an amendment to the bill appropriating money for the purchase of the country the proposed action would bring us. This is the famous Wilmot Proviso, which prohibited slavery in the territory thus proposed to be purchased. As thus amended the bill passed the House, but failed in the Senate; and in the next year another bill with a similar provision passed the House, but the amendment was omitted in the Senate.

It was this bill which gave the logic of John C. Calhoun another opportunity. He insisted that the Constitution, *ex proprio vigore*, extended to the Territories. This is what Benton ironically called "the transmigration of the Constitution." Bitterly and with all his powerful sarcasm Benton opposed the doctrine, insisting that the Constitution was applicable alone to the States.[1]

In 1849 when Congress came to legislate for California and New Mexico, territory lately acquired from Mexico, the debate was renewed with great vigor, especially in the Senate. Berrien of Georgia, Dayton of New Jersey, Webster and Calhoun arose to their greatest heights. Said Webster: "Let me say that in the general sense there is no such thing as extending the Constitution. The Constitution is extended over the United States and over nothing else. It cannot be extended over anything except the old States and the new States that shall come in hereafter when they do come in. There is a want of accuracy of ideas in this respect that is quite remarkable among eminent gentlemen, and especially professional and judicial gentlemen. It seems to be taken for granted that the right of trial by jury, the *habeas corpus* and every principle designed to protect personal liberty, is extended by force of the Constitution itself over new territory. That proposition cannot be maintained at all. . . . Altogether im-

[1] Benton, Thirty Years' View, v. 2, 713.

practical," he concludes and "utterly impossible to extend the Constitution of the United States to the Territories."

How far short in this doctrine the "Great Expounder" fell, is well known to every constitutional lawyer.

In reply Calhoun said: "Well, then, the proposition that the Constitution does not extend to the Territories is false to that extent. How else does Congress obtain the legislative power over the Territories? . . . If the Constitution does not extend there, you have no right to legislate or to do any act in reference to the Territories. . . . [The Constitution] is the supreme law, in obedience to which and in conformity with which all legislative enactments must be made."

Douglas, later to become famous for his relation to the Kansas-Nebraska bill, explained that he did not believe that the Constitution *ex proprio vigore* extended to the Territories, but that he believed that Congress had "the power to extend it in all its parts, over that country; and that such extension, in his opinion, made the Territory a State, entitled to representation in Congress, in a *quasi* condition until it could elect its representatives to Congress and organize its State government."[2]

There was no decision of the Supreme Court, the arbiter of last resort in such questions, by which it could be known which contention was the correct one, so the great party leaders reargued their respective positions with each new occasion. In the main the views of Calhoun and those who concurred with him obtained, and the supremacy of the Constitution saved us from degenerating from a democracy. Ever alert, the school of Webster and Benton watched for opportunities to sustain their contentions. So, Congress having refused to follow Webster, his forces turned to the courts as the last source from which it might be possible to retake the lost field.

However, before noticing the specific instance by which it was hoped to retrieve their losses, it is important to remember that as territorial expansion went rapidly westward

[2]Cong. Globe, 30 Cong., 2d sess., v. 20, 255 et seq.

with it developed on the part of the North, not an effort to destroy slavery because it was slavery, but a bitter antipathy to the negro, the free negro quite as much as the slave; and hence an antagonism to slavery because of the fact that it carried with it the negro. Nowhere was this feeling more implacable than in the newer Northwest States and in the Territories. This opposition to the negro, regardless of his condition, gathered its strength into what came to be known as the Free-Soil party. In 1848 this party nominated and supported Martin Van Buren for President and Charles Francis Adams for Vice-President. Later the anti-negro and anti-slavery forces assumed the name of Free-State party, and in 1859, furnished the bulk of the material for the Republican party which elected Mr. Lincoln. Those affiliated with these various parties proposed, as they had done in Kansas, and earlier in Oregon, to build governments for great States "for free white men only;" and to so safeguard these local governments, as they had done in Illinois and in Ohio, that free negroes would have no part and under which they would have few rights which the white man was bound to respect, and under which a free negro had no legal right to live as a *citizen*. Thus by local laws the free negro was debarred the right of imigration and of residence as he might choose.

This fight against the negro, it was foreseen, would be easier could the Federal Government be brought to protect the Territory, and so by 1859 the Republicans had grown insistent that the government not only should prohibit slavery in the Territories, but that under the Constitution the government could not do otherwise. At the same time, little concerned for the slave as such, it was proposed existing slavery be made express and irrevokable.[3]

From the ranks of these parties came the means for the prosecution and from their leadership came the men who instituted and who conducted to its conclusion the Dred Scott Case.

[3]See platforms of 1856 and 1859. Stanwood, A Hist. of the Presidency, 293.

Dred Scott, of pure African descent, was born of slave parents in Virginia the slave of Captain Peter Blow. His master carried Dred to Missouri about 1827; and there, in 1834 or 1835, he was purchased as a slave by Dr. John Emerson. Dr. Emerson was a native of Pennsylvania, and from that State had been appointed as an assistant surgeon in the regular United States army. He was honorably discharged from the army in 1842, and died shortly thereafter.[4] But so far as the courts knew, and as appeared by the record, Emerson was a citizen of Missouri.[5]

In July, 1847, in the State circuit court for the county of St. Louis, Missouri, an action was instituted in which it was asked that Scott be adjudged a freeman. In this suit, brought against Emerson's widow, the administrator, and his surety, it was alleged that Emerson purchased Scott in 1835, and that about 1836 or 1837 he had been carried by the purchaser "from the State of Missouri to Fort Snelling, under the jurisdiction of the United States and in the Territory formerly known as Louisiana, and there held in slavery in violation of the Missouri Compromise."

In November, 1847, and while the first action was yet pending, a second suit in the same court and against the same parties was instituted. This is what is known as a trespass action, and its technical name has misled some authors to state that Scott had been whipped.[6] Nothing in any record anywhere indicates that Scott or any of his family was ever struck. In this later action it was alleged generally, being left to the trial to give specific grounds, that Scott was "a free person, and that the said defendants had held and still hold him in slavery, and other wrongs to the said plaintiff then and there did against the laws of the State of Missouri." In April, 1847, this action was tried before a jury who rendered a verdict

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[4] F. B. Heitman, Hist. Reg. and Dec. (1903); W. H. Powell, List of Officers U. S. A., 1779 to 1900, 301.

[5] 19 How. 527.

[6] Fiske, Hist. U. S. (school ed.), 360; Francis Curtis, The Republican Party, vol. 2, 276; and many others.

against Scott. In December, 1847, this verdict was set aside and a rehearing ordered. At this hearing Scott offered as his evidence the facts of his original slavery, the purchase, and that from Missouri he had been carried to Rock Island, a military fort, in the State of Illinois; and from there to Fort Snelling, in a Territory of the United States (now Minnesota), and at each place detained in servitude about two years, his master being a sojourner and under orders from the government. Upon these facts the judge instructed the jury to bring in a verdict for Scott. Thereupon the defendants appealed to the supreme court of the State. In 1852, the matter resting purely upon questions of law, the case came up for hearing by the State supreme court. Of the three justices then composing the court, two concurred and one dissented. The majority held that the circuit judge was in error as to the law. Having been a slave under and pursuant to the laws of Missouri, having been temporarily out of Missouri, having been held as a slave while away, having been returned as a slave and having sued there, the higher court held that however valid any anti-slavery laws out of Missouri might be, they were not and could not be operative in Missouri, that they were penal in their nature, and would not be enforced by a Missouri court, because in conflict with her policy and laws. No one claimed that either law the benefit of which Scott invoked had any jurisdiction in Missouri.[6] The first claim was based upon the old Ordinance of 1787, in so far as it was of force in Illinois. Historians since however, have enlarged upon the claims of the sojourn in Illinois.[7] Illinois was not, as has been said by some[8] "doubly protected against slavery;" there was no law whatever of that State under which Scott could have been adjudged free even had he sued while there. Illinois was protected against the free negro; and at no time did she enact any law to enable a slave from any other State to assume the status of a freeman. Repeatedly her highest courts held the

[7]Thorpe, Const. Hist. U. S. (1901), 537.

[8]Hill, Decisive Battles of the Law, 247.

Ordinance of 1787 to be void and inoperative, upholding her local slave laws.[9] So as a question of law, the Missouri State trial court was in error, and therefore it was reversed and the case sent back for a new trial pursuant to law as laid down by the higher court.[10]

In 1848 the first and original action had been dismissed, and now it was agreed that the pending action should stand upon the court docket until a hearing could be had in the *United States court* in which Scott's lawyer said he wished also to sue. Accordingly R. M. Field, a well-known St. Louis attorney, representing Scott, in November, 1853, began an action in the *Federal* circuit court for the district in which St. Louis is located. In May, 1854, the cause went before a jury, who found against Scott and his family. Thereupon, a new trial having been refused, an appeal based upon exceptions to the rulings of the trial court, was taken to the Supreme Court of the United States. The facts of the State action, the nature of its decisions, and its abeyance until the decision of the Federal cause, were set out in the record which thus came before the highest Federal court.[11] When a final decision should have been reached in the State courts, an appeal to the Supreme Court of the United States could have been taken, Federal laws involved being ground of appeal. Such an appeal would have brought up every question of merit of the case before the highest court. But Field was a determined Free-Soiler, [12] and since Scott's cause was not to be benefitted by a new action in a Federal court, Field must have had some political purpose in his move, especially since it was not probable the new action could be terminated more speedily than the action in the State court.

Remember that the jurisdiction of Federal courts is lim-

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[9] Ewing, Nor. Reb. and So. Session, chap. v and vi; and *infra*.

[10] 15 Mo. 582.

[11] Transcript of Records, 1856, U. S. Sup. Court Clerk's Office, vol. 4, No. 3, p. 65 (11).

[12] Clesky's Pol. Text-Book, 1860, 207; Benjamin's Speech in U. S. Senate, March 3, 1858.

ited to cases defined by the Constitution. One such ground is where litigants are citizens of different States. There being no other ground for original Federal jurisdiction, it was declared that Scott was a *citizen* of Missouri, that he had been purchased and was being held in slavery by John F. A. Sandford (Sanford, as the name is usually spelled), and that Sandford was a citizen of the State of New York. This was a pure fiction; but Sandford was the brother of Dr. Emerson's widow, and all parties connived for the purpose of reaching the court with all questions they wished decided.

Too long it has been believed that "as the wily chiefs of Democracy were casting about for a feasible plan of action" in an alleged "effort to fasten slavery upon the Territories," they instituted and prosecuted the Dred Scott Case. Neither these "wily chiefs" nor any Southern leaders were directly or indirectly responsible for this case. That they were not and that the case was a political probe used by wily Northerners, aggressive free-soilers and Republicans, is the more clear when we remember that the collusion as to sale resorted to in order to reach the Federal court, was between Scott's lawyers and Sandford, of New York, all anti-Southern, Dr. Chaffee of Massachusetts, a Republican member of Congress being a party to the agreement. If there had ever been hope of recovering damages against Emerson's estate, in confirmation of which the evidence is entirely lacking, sometimes given as the early motive for the institution of the suit, this hope was abandoned in the interest of the desire entertained by Northern leaders to obtain some advantage against the South and the Democrats. Sandford could not have been held liable for damages alleged to have accrued prior to his purchase, and as no effort was made to show ownership for any time before the Federal action, nothing more than nominal damages could have been obtained against him. The claim that Scott had been by Sandford heavily damaged, set up in the declaration, was, therefore, no more than a blind to hide the real purpose of the politicians.

Of the questions involved in the case as presented to the Federal courts, that of the constitutionality of the Missouri Compromise was the greatest. Constantly stronger up to the institution of this Federal action had grown the conviction, North and South, that the prohibition imposed by the Missouri Compromise was contrary to both the letter and fair intendment of the Constitution; and, for that reason, at the very institution of the Federal suit, its repeal trembled in the balance. If the Supreme Court of the United States should declare such a measure warranted by the Constitution as many especially in the North confidently believed it would, then the great argument in favor of the repeal would be swept from the Democrats. The next year, 1854, and shortly after the institution of the Federal action, the Democrats having a majority in Congress, the Missouri Compromise was actually repealed; but the North was so determined on saving the Territories for her emigrating white laborers, for free white people only, that the next session of Congress found the Democratic majority reduced to a minority, and a crusade for the restoration of the prohibition relentlessly begun. So the power of Congress to enact such a prohibition remained a vital issue in the case, a case destined to become one of the most famous in American history.

The widow Emerson married Dr. C. C. Chaffee of Massachusetts. About the time the case was disposed of by the Supreme Court, Dr. Chaffee was representing his State in Congress. He was a radical Republican—a member of what was known as the "Black Republican Party." In May following the court's final decree, Dr. Chaffee conveyed Dred and his family to Taylor Blow of St. Louis, on condition that they be emancipated, and it is said that this was done on May 26.[13] May 27 the *St. Louis Republic* said: "Old and worn out" Scott "will have a hard time to make a living if he is forced to depend upon the charities of Black Republicans and abolitionists."

[13] *Boston Courier*, quoted in Providence, *R. I. Post*, March 17, 1857; *Washington City Union*, June 2, 1857.

As I write this I have before me a letter from the circuit court clerk of the eighth judicial circuit, St Louis, saying that "after diligent search" he is unable to find the deed emancipating Scott. One evidently was made, since its mention is found in the index. But from all I am able to gather, I am confident that no provision was ever made for Scott's old age. His Massachusetts master and mistress simply turned him loose to wander the streets of St. Louis, get odd jobs when he could, and shift as circumstances permitted.[14] At one time, there seems to be no doubt, Dred offered to buy his freedom of Mrs. Emerson, tendering her his market value in cash and good security, but she refused the offer. A great anti-Southern party needed him, and he was not emancipated until he had served their purpose and was no longer of any personal or political value. The New Hampshire *Patriot* and State *Gazette* gives the Springfield, Ill., *Argus* the credit for discovering Scott's Northern slave-master. Says the *Gazette*: "That paper first exposed to the world that a Black Republican freedom-shrieking member of Congress from Massachusetts was the owner of that family of slaves, and that the suit for their freedom was in fact opposed for his benefit."[15] In the New York *Tribune* for March 17, 1857, there is a letter from Dr. Chaffee purporting to explain his relation to Dred. The letter shows his evident embarrassment; Chaffee feebly claims he did not own Scott, yet the doctor impeaches that claim by immediately manumitting the negro.

Upon the trial in the Federal circuit court H. A. Garland for Sandford and R. M. Field for Scott entered into a written statement which went to the court as "the facts of the case." So, at all times the questions for the courts were purely those of law arising upon the admitted facts. In the lower court Field was assisted by Francis P. Blair, also an eminent St. Louis lawyer, an active member of the Free-Soil party, and later a stanch Republican. After the case had

[14] *St. Louis News*, April 8, 1857, and *N. Y. Tribune*, April 10.

[15] See issue of June 3, 1857.

reached the Supreme Court of the United States, it was argued from the standpoint of the party behind the case and that was furnishing funds for its prosecution, by Montgomery Blair, postmaster general under President Lincoln, a brother of Francis P. Blair, and George T. Curtis, a brother of Mr. Justice Curtis who delivered the stronger of the two dissenting opinions. Reverdy Johnson, the distinguished Maryland lawyer, and Henry S. Geyer, Senator from Missouri, represented the other side. Johnson volunteered out of consideration for the court.

Taking the view of the law as announced by the State supreme court, the trial Federal court held that upon the merits of the case neither Scott nor any of his family had become entitled to the status of a freeman. The facts of the case were the same before all of the courts.[16] These agreed facts, being those which went to the Supreme Court of the United States with the appeal from the result in the trial Federal court are:

Dr. Emerson, in the regular service of the United States army, purchased Scott in Missouri, where the latter was held in slavery under laws recognized by the Constitution of the United States as valid. In 1834, going from Missouri, and under army orders, Emerson carried Scott to the military post at Rock Island, Illinois, "and held him there as a slave until the month of April or May, 1836." Under government orders the doctor then moved, taking Scott, to the military post at Fort Snelling, "situated on the west bank of the Missouri river, in the Territory known as Upper Louisiana, acquired by the United States from France, and situated north of the latitude thirty-six degrees and thirty minutes north, and north of the State of Missouri." There Dr. Emerson held Scott in slavery until 1838, when he removed the negro, his wife and child back to Missouri.

In 1835 Major Taliaferro, also an army officer, owned a negro girl, Harriet, whom he carried to Fort Snelling, going

[16] 19 Howard, 552.

there in discharge of army duty. At Fort Snelling in 1836, the major sold "Harriet and delivered her as a slave"[17] to Dr. Emerson. There she was held in slavery by the doctor until 1838, at which time she and Scott were returned to Missouri with the Emersons.

In 1836 Harriet and Dred, with the consent of Dr. Emerson, "who then claimed to be their master and owner, intermarried, and took each for husband and wife." Of this marriage there were two children, Eliza and Lizzie. The former was "born on board the steamboat Gypsie, north of the north line of the State of Missouri, and upon the river Mississippi." Lizzie was born at Jefferson Barracks in Missouri.

During the time Dr. Emerson and Major Taliaferro were thus at Rock Island and Fort Snelling they were acting under orders from the officials of the Federal army; they had not gone either to Illinois or to Fort Snelling in what was at the time Wisconsin for the purpose of remaining permanently. As with all our army officers, they were liable to be recalled and removed at any moment; their stay was temporary.

When the case at length, March 6, 1857, was decided by the Supreme Court of the United States, the result was taken to be a great victory for the principles of the Democratic party, and there was much rejoicing throughout the ranks, especially at the South. Democrats in Congress asked for the publication of several thousand copies of the opinion, which was ordered at a cost to the government of $6,500. The appropriation for this expenditure had little opposition, though Republican members were careful to explain that their assent must not be taken to indicate approval of the court's decision.[18]

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[17]Original Record, p. 10, Clerk's Office U. S. Supreme Court.
At the time Dr. Emerson was on duty at Fort Snelling quite a number of slaves of both sexes were held there by post officers. Taliaferro had several he had inherited in the State of his birth, Harriet being one. Holcombe, (1908) Minn. in Three Centuries, v. 2, 66.

[18]Cong. Globe, 35 Cong., 1 sess., 1069-70; Ib. 36 Cong. 1 sess., Appendix, 293.

III.

THE OPINION READ BY CHIEF JUSTICE TANEY THE JUDICIAL OPINION OF THE COURT.

When an action is brought in a Federal court, not usually required in a State court, the plaintiff's writing of complaint must set out a ground for the jurisdiction of the court. In the Dred Scott Case the complaint known in law as the declaration, filed by Scott's lawyer, as we observed in the preceding chapter, averred the plaintiff Scott to be a citizen of Missouri, and that Sandford, by whose authority it was alleged Scott was being improperly and unlawfully held in slavery, was a citizen of New York. Hence, upon this statement intended to show the *Federal* court *a ground of jurisdiction,* it appeared that the suit was a controversy "between citizens of different States." This statement, if true, furnishes one of the grounds for original jurisdiction by a Federal court as provided by section two of article three of the Constitution. Unless allegations showing jurisdiction are called in question by special plea the court, unless it has reason to do so upon its own motion, accepts the statement as true, and hears the case. So Sandford's attorney replied to this affirmation of citizenship by what is known as a plea in abatement; that is, he said that for reasons alleged in the plea Scott was not a *citizen* of Missouri, and that therefore the *Federal court* had no jurisdiction and that the suit should stop. The circuit court overruled this plea, and then proceeded to hear the case on its merits.

When a case goes up to a higher court on appeal, as this did from the Federal circuit court to the United States Supreme Court, a transcript of the proceedings in the trial

court is made, and this record, and it alone, is the basis of the final action by the higher court.

Finding this plea in abatement in the record, to which there had been a demurrer, and the judgment of the trial court sustaining the demurrer and overruling the plea, Chief Justice Taney's opinion held that these were properly before the Supreme Court for review, because "a writ of error always brings up to the superior court the whole record of the proceedings below."[1]

Overruling the judgment of the trial court upon its finding upon this plea and its admitted facts, the opinion of the Supreme Court holds that the trial court erred in exercising jurisdiction further than to pass upon the questions raised by this plea, because "persons whose ancestors were negroes of the African race and imported into this country and sold and held as slaves," were not *citizens* in the sense as meant by the Constitution, just as Indians were, admittedly, not comprehended by the term[2] and, hence, as *citizens* such persons could not sue a citizen of another State in a Federal court, relying upon diverse citizenship as a sole ground of jurisdiction.

Then, passing on to the rest of the record, the opinion discusses and decides the grounds upon which Scott alleged that his once lawful slavery had been destroyed. Thus it came about that the opinion held that the Missouri Compromise, that act of Congress which declared involuntary servitude *within the Louisiana Purchase* and outside of Missouri and north of thirty-six degrees thirty minutes, illegal, to have been contrary to the Constitution, and so of no validity. Hence, Scott's stay in Wisconsin,[3] within the Territory of this law and while it was yet unrepealed and of full apparent force, could not operate to destroy the previously existing slave status.

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[1] 19 Howard, 403.

[2] Ib. 404.

[3] Then a Territory which is now a part of Minnesota.

Now it is claimed that no judicial majority of the Supreme Court of the United States concurred with the Chief Justice in his treatment of the question raised by the plea in abatement. Others admit that a majority did treat and dispose of the plea in abatement in concurrence with the Chief Justice, but stoutly insist that there was no judicial authority in concurrence with him in the decision that the Missouri Compromise law was unconstitutional. While still other eminent writers (such as Dr. Thayer of Harvard University) insist that the opinion as read by the Chief Justice was his individual opinion, and that there was in no sense an opinion and decision of the court.[4]

We must remember that where any court is composed of more than two judges, a majority agreement is always, without any question in the United States, accepted and respected as the *opinion and decision of the court.* Were it otherwise we should very seldom find such a court reaching a conclusion or a determination of the questions in any given case before it. In the Dred Scott Case each member of the court on opinion day read a written statement; and Chief Justice Taney claimed that his paper was the judicial opinion and decision of the court. That is, he claimed that five or more of the judges had concurred in his opinion and decision.

It will be helpful to remember as we investigate these disputed questions that a judicial decision may be said to be composed of three parts: (1) The reasoning, argumentative illustrations, authorities, etc. (2) The opinion; that is, the conclusion that asserted premises are true. (3) The judgment or decree.

Mr. B. R. Curtis, a son of Justice Curtis, in collaboration with his uncle, Mr. G. T. Curtis, who was of counsel in arguing this case before the Supreme Court, in their life of Judge Curtis have given plausability to a widespread belief that the question of citizenship as it was presented by the facts contained in the plea in abatement, was the only point

[4]Thayer, Cases on Constitutional Law, 493, note 1.

which had a judicial majority, and so the only point *decided*. They say that "there never was a judicial majority, speaking correctly, formed upon the question of the power of Congress to prohibit slavery in a Territory, and consequently a claim that a 'decision' adverse to the power had been made by the Supreme Court was erroneous."[5] And on page 207 of the same work, speaking of the opinion as read by the Chief Justice, it is said that "no other judge, except Mr. Justice Wayne, concurred in all its points, reasonings and conclusions."

The high source from which they emanate has given these claims much force with many historians and encyclopedists. But the questions thus raised are determined by the record; and the record, upon the point as to which it is challenged, is so simple that no legal ability is needed to determine what it proves. All that is necessary is to turn to the volume containing the official report of the case and there read what the respective members of the court have to say.

The statements of Mr. Justice Daniel, which are unquestioned by any member of the court, amply refute the claim of the Curtis family concerning the decision of the court involving the validity of the Missouri Compromise. Speaking with reference to the constitutionality of the Missouri Compromise, and as to what effect should be given in Missouri to the law of Illinois, he said that "with respect to them the opinions of a majority of the court, including my own, are *perfectly coincident*." He is overwhelmingly corroborated by the facts as they appear on the record; and that we may see this, finding for ourselves that he could not have been mistaken, let us first see the history of the case while actually before the court, and, after that, go to the record and there see what the respective judges say upon each question, and thus find their attitude toward the opinion as read by the Chief Justice.

Mr. Justice Curtis was succeeded upon the bench in 1858. He retired to the State of Rhode Island, and at Newport,

[5]Benj. R. Curtis, Jr., The Life of B. R. Curtis, v. 1, p. 195.

September 15, 1874, died. At the next meeting of the Supreme Court appropriate and touching services were held in honor of his memory. Hon. J. A. Campbell, who was the Mr. Justice Campbell when the Dred Scott Case was before the court, had retired from the bench and was then at the bar. In the course of his address on that occasion, referring to the Dred Scott Case, he said: "There was nothing in the deliberation of that case to distinguish it from any other."

Hence, each member of that court knew whether his assent to the opinion of the Chief Justice were needed to make it the official and proper court document, the *"judicial opinion and decree of the court."* Now, what Judge Campbell said, speaking from memory after twenty years, concerning the judicial opinion of the court as to the treatment of the plea in abatement, has been relied upon strongly by those who claim that the court did not furnish a majority who agree that the question "which presented the capacity of a person of African descent to be a citizen," was open for the decision of the Supreme Court. That is, the question raised by the plea in abatement. Judge Campbell says that he, Justices McLean, Catron, Grier and Nelson, upon the reargument of the case became a majority which held that the plea in abatement was not open. Mr. Justice Campbell adds: "Each of these judges has recorded in his opinion that there was nothing in the plea in abatement before the court for review."[6]

So I shall make an analysis of the record which I shall submit proves that those who agree with the position taken by the Curtis family and those who agree with what Mr. Justice Campbell says, are all mistaken in their respective positions. The record does not sustain Judge Campbell, thus showing that at his advanced age his memory must have been somewhat at fault.

I am persuaded that one difficulty to see the majority agreement has been that some of those who agree or concur with the Chief Justice upon the grounds of one question differ

[6]Tyler's Memoir of Chief Justice Taney, 382-5.

from him upon the reasoning of another, while those who dissented from him upon the first agreed with him upon the second, and so on throughout, with the exception of Justices Wayne and Daniel whose assent and concurrence met his opinion upon each question, and the reasoning and conclusion thereupon. These together with the Chief Justice constitute three, and so we need only two more in concurrence with them upon the opinion as read by the Chief Justice to constitute the judicial power of the court.

Then, did a majority of the judges accept the opinion—and with it the judgment—as read by Chief Justice Taney, as that of the court?

That I am correct as to Judges Wayne and Daniel, let me quote them.

Said Mr. Justice Wayne: "Concurring as I do entirely in the opinion of the court, as it has been written and read by the Chief Justice—without any qualification of its reasoning or conclusions—I shall neither read nor file an opinion of my own in this case, which I prepared when I supposed it might be necessary and proper for me to do so."

"The opinion of the court," he continues, "meets fully and decides every point which was made in the argument of the case by the counsel on either side of it. Nothing belonging to the case has been left undecided, nor has any point been discussed and decided which was not called for by the record, or which was not necessary for the judicial disposition of it, in the way that it has been done, by more than a majority of the court."[7]

Judge Daniel, after pointing out, in harmony with the Chief Justice that "the African race have never been acknowledged as belonging to the family of nations," said:

"In the plea in abatement, the character or capacity of citizen on the part of the plaintiff is denied, and the causes which show the absense of that character or capacity are set forth by averment. The verity of these causes, according to the set-

[7] 19 Howard, 454.

tled rules of pleading, being admitted by the demurrer, it only remained for the circuit court to decide upon their legal sufficiency to abate the plaintiff's action. And now it becomes the province of this court to determine whether the plaintiff below (and plaintiff in error here), admitted to be a *negro* of African descent, whose ancestors were of pure African blood, and who were brought into this country and sold as negro slaves—such being his *status,* and such the circumstances surrounding his position—whether he can, by correct legal induction from that *status* and those circumstances, be clothed with the character and capacities of a citizen of the State of Missouri?

" . . . The correct conclusion upon the question here considered would seem to be these:

"That in the establishment of the several communities now the States of this Union, and in the formation of the Federal Government, the African was not deemed politically a person. He was regarded and owned in every State in the Union as *property* merely, and as such was not and could not be a party or an actor, much less a *peer* in any compact or form of government established by the States or the United States. . . . That so far as rights and immunities pertaining to citizens have been defined and secured by the Constitution and laws of the United States, the African race is not and never was recognized either by the language or purposes of the former; and it has been expressly excluded by every act of Congress providing for the creation of citizens by *naturalization,* these laws, as has already been remarked, being restricted to *free white aliens* exclusively."[8]

Had he repeated the exact words of the Chief Justice he could not more forcibly have expressed his concurrence in the opinion that the plea, the demurrer, and the facts thus presented and admitted were before the Supreme Court, upon consideration whereof that the circuit court had improperly exercised jurisdiction.

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[8]Ib. 475, 481-2.

Did Daniel concur with reference to the other decisions and the judgment? His language is unmistakable:

"According to the view taken of the law, as applicable to the demurrer to the plea in abatement in this case, the questions subsequently raised upon the several pleas in bar [that is, that Scott was free because of the laws respectively in the Territory and in Illinois] might be passed by, as requiring neither a particluar examination, nor an adjudication upon them. But as these questions are intrinsically of primary interest and magnitude, and have been elaborately discussed in argument, *and as with respect to them the opinions of a majority of the court, including my own, are perfectly coincident*, to me it seems proper that they should here be fully considered, and, so far as it is practicable for this court to accomplish such an end, finally put to rest."[9]

Our concern at this point is to see whether there was a majority concurrence; we shall see further on whether it was an error to decide the other questions after this disposition of the plea in abatement.

Now, upon the question whether "the facts relied upon by the plaintiff entitled him to his freedom,"[10] the opinion as pronounced by the Chief Justice was: (1) That "the act of Congress which prohibited a citizen from holding and owning property of this kind in the Territory of the United States north of the line mentioned, is not warranted by the Constitution, and is therefore void; and that neither Dred Scott himself, nor any of his family, were made free by being carried there by the owner, with the intention of becoming a permanent resident." (2) "As Scott was a slave when taken into the State of Illinois by his owner, and was there held as such, and brought back in that character, his *status*, as free or slave, depended on the laws of Missouri, and not of Illinois;" and that upon "a careful examination of all the cases decided in the State courts of Missouri, referred to, it is now

[9] Ib. 482.

[10] Ib. 430.

firmly settled by the decisions of the highest court in the State, that Scott and his family upon their return were not free, but were, by the laws of Missouri, the property of the defendent; and that the circuit court of the United States had no jurisdiction, when, by the laws of the State, the plaintiff was a slave, and not a citizen."[11]

And the judgment: "Upon the whole, it is the judgment of this court, that it appears by the record before us that the plaintiff in error is not a citizen of Missouri, in the sense in which that word is used in the constitution; and that the circuit court of the United States, for that reason, had no jurisdiction in the case and could give no judgment in it. Its judgment for the defendant must, consequently, be reversed, and a mandate issued, directing the suit to be dismissed for want of jurisdiction."[12]

Now, compare the above words with those of Mr. Justice Daniel in his plain arguments on pages 468 to 492, wherein he maintains that the question belonged to Missouri rather than Illinois, and that Congress had no power to enact the Missouri Compromise; and with these read his conclusion on the latter page:

"In conclusion, my opinion is, that the decision of the circuit court, upon the law arising upon the several pleas in bar, is correct, but that it is erroneous in having sustained the demurrer to the plea in abatement of the jurisdiction; that for this error the decision of the circuit court should be reversed, and the cause remanded to that court, with instructions to abate the action, for the reason set forth and pleaded in the plea in abatement."

Hence, we have two judges of that court who concur with the opinion and judgment of the Chief Justice without reservation as to either question. We must now look for the necessary majority agreement of five or more justices upon the questions taken separately, remembering that each gets

[11]Ib. 452-3.

[12]Ib. 454.

its validity from its own support, and that where each had a majority assent, though as compared to each other that majority may differ somewhat in its individual makeup, the whole is as valid as though the same judges had agreed upon each separate branch.

Mr. Justice Nelson discussed very fully and very convincingly both branches of the second question as given above; upon the second he was more elaborate than the Chief Justice, but upon the questions which he *discussed* he concurred fully and entirely with the Chief Justice. Notice his language: "Our conclusion, therefore, is, upon this branch of the case, that the question involved is one depending solely upon the laws of Missouri, and that the Federal court sitting in the State, and trying the case before us, was bound to follow it." And on the next branch of the same question:" . . . turning to the decisions in the courts of Missouri, it will be found that there is no discrepancy between the earlier and the present cases upon this subject. . . . Upon the whole, it must be admitted that the current of authority, both in England and in this country, is in accordance with the law as declared by the courts of Missouri in the case before us, and we think the court below [the Federal circuit court] was not only right, but bound to follow it."[13]

Mr. Justice Grier said: "I concur in the opinion delivered by Mr. Justice Nelson on the questions discussed by him," and as the questions which Mr. Justice Nelson discussed were coincident with the opinion upon those points as read by the Chief Justice, he necessarily concurred thus far with the Chief Justice; and he meant us to so understand, since upon those points the Chief Justice had announced a conclusion after a brief discussion. It is very noticeable that Judge Grier takes care to say that he agrees with Judge Nelson's discussion, that it might be fully observed that he did not agree with what Judge Nelson regarded as a proper judgment resulting from his opinion; Judge Nelson held that the judgment of the cir-

[13]Ib. 465 and 463.

cuit court should be affirmed, since it adjudged Scott, under the Missouri law, a slave.

So upon the second question as decided in the opinion as read by the Chief Justice, to wit: that Scott's status depended upon the laws of Missouri, and not of Illinois, and that the highest court in Missouri had correctly and firmly settled that after their return to Missouri Scott and his family were not free, but were, by the laws of Missouri, the property of the defendant—we have in concurrence Chief Justice Taney, Justices Wayne, Daniel, Nelson and Grier, a numerical majority whose opinion thus became a judicial decision.

Last, though first in chronological order, was the plea in abatement, with its demurrer by Scott, which simply means that the statements were admitted facts, raising the question, "whether any person of African descent, whose ancestors were sold as slaves in the United States, can be a citizen of the United States" or of a State in the sense in which the Constitution had used the word, before the court? That it was and should be considered, we have Chief Justice Taney, Justices Wayne, Daniel, Curtis,[14] Grier and Nelson, and in part Campbell. On page 518 the last named says: "And so far as the argument of the Chief Justice upon the plea in abatement has a reference to the plaintiff or his family, in any of the conditions or circumstances of their lives, as presented in the evidence, I concur (also) in that portion of his opinion." So he did concur that the plea in abatement in some sense, at least, was before the court; and he did concur fully as to the opinion concerning the citizenship which the facts set out in the plea denied.

Justice Grier was willing that the judgment of the circuit court be either affirmed or reversed; but in his assent that the opinion and judgment as rendered by the Chief Justice was the *opinion and judgment of the court,* he agreed that it might be reversed; and also thus concurred with the opinion

[14] Ib. 565.

as to the treatment of the plea in abatement. His language is: "I also concur with the opinion of the court as delivered by the Chief Justice, that the act of Congress of March 6th, 1820, is unconstitutional and void; and that, assuming the facts as stated in the opinion, the plaintiff cannot sue as a citizen of Missouri in the courts of the United States. But that the record shows a prima facie case of jurisdiction requiring the court to decide all the questions properly arising in it [the very first of which was the plea in abatement]; and as the decision of the pleas in bar shows that the plaintiff is a slave, and therefore not entitled to sue in a court of the United States, the form of the judgment is of little importance; for, whether the judgment be affirmed or dismissed for want of jurisdiction, it is justified by the decision of the court, and is the same in effect between the parties to the suit."[15]

Notice his words: "Justified by *the* decision of *the court.*" To what did he refer? Plainly, to "the opinion of the court as delivered by the Chief Justice," and to the "facts as stated in the opinion." No language could be plainer than that he recognized the opinion and judgment as announced by the Chief Justice as the opinion and judgment of the court. He does not dissent from it; and, even were his language less clear and undoubted, sitting in the case and participating judicially, his concurrence with what he calls the "opinion of the court" would be implied. So both expressly and tacitly he concurred with the Chief Justice.

I am also firmly convinced that Judge Nelson should likewise be counted with the majority in the treatment of the plea in abatement. While he is not needed to help to a judicial majority upon that point, yet I fully believe he meant to concur with the Chief Justice. I am of opinion that a careful reading, in the light of the facts, of his opinion will bear out this claim. It is true that he said in the outset of his statement that it would not be necessary to pass upon the question of citizenship raised by the plea in abatement. But it is

[15] Ib. 469.

agreed by all who know the facts that the paper which he filed was written after the first argument and at a time when it was understood that he was writing the opinion of the court. After the second argument all the judges understood that the Chief Justice would write for the court its opinion; this document had been read to the judges before it was read from the bench; each knew its contents, and, without rewriting in full, Judge Nelson changed some of the wording of what he had long before the final decision prepared. All that he says is that "it will not be necessary to pass upon the question." He does not say that to pass upon it would be improper; and, in fact, what he does say clearly leaves us to understand that he does believe that the plea in abatement is properly before the court; but that the same question is raised by the pleas which came after it; and that upon their decision the judgment must be in effect the same as upon the plea in abatement. He says that in Federal courts, "if the facts appearing on the record show that the circuit court had no jurisdiction, its judgment will be reversed in the appellate court for that cause, and the case remanded with directions to be dismissed."[16] This was exactly the doctrine upon which the Chief Justice proceeded.[17] We can justly say of Judge Nelson in this respect that, while he does not, in his remarks, take that plea into account, yet he nowhere says that he is unwilling that the Chief Justice do so on behalf of a majority of the court; and a judge who sits in a case, I may repeat, and who participates, always concurs with what is handed down as the opinion of the court, unless he plainly gives us to understand otherwise.

Hence, on all the points decided in the opinion as read by the Chief Justice we have a concurrence of a judicial majority; and as to the judgment which was based upon that opinion as "a whole," we have the Chief Justice, and Justices Wayne,

[16] Ib. 458.

[17] Ib. 401.

Daniel, Grier and Campbell—a judicial majority,—and hence the judgment of the court.

I have deemed it important as well as interesting thus to show analytically by whom and how each point or question decided in the opinion handed down by the Chief Justice became the official, judicial action of the Supreme Court of the United States. But aside from, or perhaps cumulative to, this, there is what I regard as absolutely irrefutable evidence to support my conclusions. That we may see its force the more clearly, let me quote what Judge Campbell tells us as to the method used by the Supreme Court in reaching a conclusion upon any case. Being off the bench and at the bar, as will be remembered, in his memorial speech before the Supreme Court in honor of Judge Curtis, among other things he said:

"The duties of the justices of the Supreme Court consist in the hearing of cases; the preparations for the consultations; the consultations in the conference of the judges; the decision of the cause there, and the preparation of the opinion and the judgment of the court. Their most arduous and responsible duty is in the conference.

" . . . The Chief Justice presided [speaking of the procedure when the Dred Scott Case was before the court], the deliberations were usually frank and candid. . . . There was nothing of cabal, combination, or exorbitant desire to carry questions or cases. Their aims were honorable and all the arts employed to attain them were manly arts. The venerable age of the Chief Justice, his gentleness, refinement, and feminine sense of propriety, were felt and realized in the privacy and confidence of these consultations. None felt them more, none has described them so well as Justice Curtis has done in his graceful tribute to our illustrious Chief Justice since his death, in the circuit court of the United States, in Boston,

"In these conferences, the Chief Justice usually called the case. He stated the pleadings and facts that they presented, the arguments and his conclusions in regard to

them, and invited discussion. The discussion was free and open among the justices until all were satisfied.

"The question was put, whether the judgment or decree should be reversed, and each justice, according to his precedence, commencing with the junior judge, was required to give his judgment and his reasons for his conclusion. The concurring opinions of the majority decided the case and signified the matter of the opinion to be given. The Chief Justice designated the judge to prepare it," or reserved that task for himself, or took it sometimes when urged by the justices.[18]

Within a few sentences from this description, Judge Campbell tells us, and there is nothing to contradict him, that there was nothing in the treatment of the Dred Scott Case to distinguish it from any other; it was taken up by the routine method and fully and quietly discussed, just as all other cases. So that each judge had ample opportunity to know exactly what was being done. This is the more clearly seen when we remember that it had been several times discussed in conference; it had been twice argued at bar, and had been pending in the court for nearly two years.

Now; in addition to the specific statements of the justices, the Chief Justice read his paper as the *opinion and decision* of the court. At no place in any of its pages does it purport to be his individual opinion. That it was being announced as the court's opinion, was understood by the bench and officers of the court, and by all present.[19] The official reporter, the sworn officer of the court, begins his report of that document by saying, "Mr. Chief Justice Taney delivered the opinion of the court." The language of the Chief Justice is that always used by the judge who is formulating for the majority its opinion and judgment; for instance: "We think they are before us;" "we proceed to examine;" "the court think the affirmative of these propositions cannot be maintained;" "In

[18] See 20 Wallace, x.

[19] *Boston Herald*, March 7, 1857.

the opinion of the court, the legislation and histories of the times," &c; "And upon a full and careful consideration of the subject, THE COURT IS OF OPINION, that upon the facts stated in the plea in abatement, Dred Scott was not a citizen of Missouri within the meaning of the Constitution of the United States, and not entitled as such to sue in its courts; and, consequently, that the circuit court had no jurisdiction of the case, and that the judgment on the plea in abatement is erroneous;" "in the case before us WE HAVE already decided that the circuit court erred in deciding that it had jurisdiction upon the facts admitted in the pleadings;" "upon these considerations, IT IS THE OPINION OF THE COURT that the act of Congress which prohibited a citizen from holding and owning property of this kind in the territory of the United States north of the line therein mentioned, is not warranted by the Constitution, and is therefore void." "Upon the whole, therefore, IT IS THE JUDGMENT OF THIS COURT, that it appears by the record before us that the plaintiff in error is not a citizen of Missouri, in the sense in which that word is used in the Constitution, and that the circuit court of the United States, for that reason, had no jurisdiction in the case, and could give no judgment in it. Its judgment for the defendant must, consequently, be reversed, and a mandate issued, directing the suit to be dismissed for want of jurisdiction."

After being told in conference what the Chief Justice was doing, and after hearing him read this opinion and decree from the bench, does anybody suppose for a moment that an honest court, that intelligent sworn judges, would have stultified themselves, would have perjured themselves, by allowing one of their number to come before the world heralding that to be their opinion which was not? All the members of the court, including Justice Curtis, ascribe to the Chief Justice the most scrupulous honesty, as well as the most exacting business methods in his judicial work. Benj. R. Curtis himself pronounced the Chief Justice "a man of incorruptible in-

tegrity."[20] The Chief Justice used no loose or uncertain language. No honest and no exact man would have come before the world with what he claimed to be the concurrent opinions and judgment of the majority of the court over which he presided with such brilliant distinction for so many years—*with other than what he claimed to bring.* Then, look at the language of the other members of the court. Not in any instance does one of them use language purporting to be the opinion of the court. All the judges participated; those who dissented seem to have believed there was some judicial opinion and decree somewhere; thy took pains to let the world know that they were *dissenting.* Although other members of the court use different arguments, add to the reasoning, or discuss fewer points, yet only the two *dissent.* It is almost laughably absurd to me to say that those nine learned men came from various conferences and did not know that there was a majority upon EACH question decided by the Chief Justice. After the conference discussion, the first thing the Chief Justice did was to tell them HIS *decision,* then he required *theirs.* And this case was conducted like all others. With this fact, notice, again but briefly, the language of the other members of the court: Judge Wayne: "I concur in the opinion of the court;" Grier: "I also concur in the opinion of the court;" Daniel: ". . . the opinions of a *majority of the court,* including my own, are perfectly coincident;" Catron: "I concur with my brother judges, that Scott is a slave, and was so when this suit was brought." Mr. Justice Curtis in his dissenting opinion admits that the judgment was pronounced by a majority of the court, and in the last letter written to Chief Justice Taney in conclusion of their controversy concerning the order issued to the clerk forbidding copies of the opinion to be published prior to the official publication, Judge Curtis, writing June 16, 1857, said: "I did not then [in a former letter], nor have I at any time, considered that I had a right to a voice on the question whether the

[20]Tyler's Taney, p. 309.

majority of the judges would allow THEIR OPINION to be published otherwise than by the reporter."[21] He was speaking directly in reference to the opinion as written by Judge Taney; and Judge Taney throughout their correspondence and elsewhere always spoke of his work as "the opinion of the court delivered from the bench."[22]

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[21]Curtis' Life of Curtis, v. 1, p. 222.

[22]It is sometimes stated that Taney "discredited himself by the most unprofessional act ever committed by a United States judge" by rewriting his opinion after reading it from the bench. See, for instance, Encyclopaedia Americana, 1903, *Dred Scott Case*. This statement is so absolutely without foundation, and is so unjust to the Chief Justice, that it is merely necessary to call attention to the fact to refute it. Having been thus accused in his lifetime, Taney replied that there had been "nothing altered," and no change whatever except the mere citation of further authorities and proofs to maintain what he had announced, and which had not been denied until after he read the opinion. His admitted integrity settles the matter; but if it did not the fact that no member of the court who concurred with him ever complained, would do so. Taney's action was entirely proper and in keeping with what is done in judicial circles every day.

IV.

CITIZENSHIP OF NEGROES.

As soon as the record before the Federal Supreme Court was opened, the question of the jurisdiction of the trial court, which had been raised by the defendant by a special plea, naturally first presented itself. This plea, known in law as a plea in abatement, presented statements as facts which, it contended, showed want of jurisdiction in the trial court to do more than pass upon their sufficiency. Scott demurred to this plea; that is, he admitted the truth of its statements and denied they were sufficient to defeat a hearing of his full case. Entering upon a consideration of the issue thus joined, the trial court, as a preliminary judgment, decided that the facts of the plea did not defeat *Federal* jurisdiction. Finding all this in the very first of the proceeding certified to it, the first question which met the Supreme Court was: Shall this appellate court pass upon this preliminary judgment of the trial court, necessarily involving an examination of the admitted facts of the plea; or shall the higher court ignore the plea and the judgment thereon, and pass only into the subsequent questions?

As we have seen, the court answered by passing upon the questions raised by the plea. To this action both Curtis and McLean assented, differing from the majority only as to the conclusion to be reached. That the plea and the question of the correctness of the trial court's judgment thereon were properly before the higher court there can be no doubt; and that such is the settled rule of appellate procedure is generally recognized. The battle was as to the *conclusion* that the court

should reach upon the question presented by the admitted facts set out in the plea. Taney and the majority, Curtis and McLean dissenting, held that upon the facts of that plea the trial court had no jurisdiction to hear the case upon its merits, because negroes descended from American slave ancestors were not such persons as the word *citizen* means when the Constitution gives Federal courts jurisdiction over suits between citizens of different States. Was this correct?

To history the importance of the answer lies mainly in the fact that the North was lashed into a fury in the belief engendered by the hypnotic power of the exacerbationists that the opinion had announced for negroes whose parents had been legal American slaves, a status unprecedented, unchristian, and unwarranted by our laws; and that in arguing this point Taney had declared that the "negro had no rights which the white man was bound to respect." Some historians yet adhere to this latter misrepresentation; and by others even yet the words of the Chief Justice are not fairly construed or correctly quoted.

The plea to the jurisdiction says that the court should not take cognizance of the action, "because said cause of action, and each and every one of them (if any such have accrued to the said Dred Scott) accrued to the said Dred Scott out of the jurisdiction of this court, and exclusively within the jurisdiction of the courts of Missouri, as alleged in his declaration, because he is a negro of African descent; his ancestors were of pure African blood, and were brought into this country and were sold as negro slaves, and this the said Sanford is ready to verify."

Prior to the fourteenth amendment the Constitution nowhere defined the meaning of the word citizen, either by exclusion or inclusion; and therefore the necessity of inquiring for the meaning of that word as indicated by the principles, the local laws and history with which the framers of the Constitution were familiar. It is generally admitted that the purpose of the fourteenth amendment of the Constitution was

to overrule the force of the Dred Scott decision and establish for negroes born or naturalized in the United States, and subject to the jurisdiction thereof, citizenship both of the United States and of the State wherein they reside.[1] So in examining the question of citizenship we must remember that it is to be determined as it was before the amendments made since the war between the States; that is, we must find the sense in which the word was used in the Constitution at the time of the adoption of that instrument.[2]

That this is the correct method, the only method in fact, as we have seen elsewhere, the dissenting judges agreed, and no one disputes. That this may be seen while at the same time we get the grounds upon which the dissenting judges held that negroes, even though descended from slave parents, were citizens, let me quote Judge Curtis. His position is representative. He argued:

"Citizens of the United States at the time of the adoption of the Constitution can have been no other than citizens of the United States under the Confederation. By the articles of Confederation, a government was organized, the style whereof was, 'The United States of America'. This government was in existence when the Constitution was framed and proposed for adoption, and was to be superseded by the new government of the United States of America, organized under the Constitution. When, therefore, the Constitution speaks of citizenship of the United States, existing at the time of the adoption of the Constitution, it must necessarily refer to citizenship under the government which existed prior to and at the time of such adoption.

". . . it may safely be said that the citizens of the several States were citizens of the United States under the Confederation.

"The government was simply a confederacy of the several

[1] In re Look Ting Sing, (1884) 21 Fed. Rep. 909; Marshall vs. Donovan, (1874) 10 Bush. (Ky.) 687; Slaughter-house Cases, 16 Wallace (U. S.) 73; U. S. vs. Wong Kim Ark, 169 U. S. 676.

[2] For an interesting discussion of citizenship under the present Constitution, see Minor vs. Happersett, (1874) 20 Wall. 162.

States, possessing a few defined powers over subjects of general concern, each State retaining every power, jurisdiction, and right not expressly delegated to the United States in Congress assembled. And no power was thus delegated to the government of the Confederation, to act on any question of citizenship, or to make any rules in respect thereto. The whole matter was left to stand on the action of the several States, and to the natural consequences of such action, that the citizens of each State should be citizens of that Confederacy into which that State had entered, the style whereof was the 'United States of America'.

"To determine whether any free persons, descended from Africans held in slavery, were citizens of the United States under the Confederation, and consequently at the time of the adoption of the Constitution of the United States, it is only necessary to know whether any such persons were citizens of either of the States under the Confederation, at the time of the adoption of the Constitution.

"Of this there can be no doubt. At the time of the ratification of the Articles of Confederation, all free-born inhabitants of the States of New Hampshire, Massachusetts, New York, New Jersey, and North Carolina, though descended from African slaves, were not only citizens of those States, but such of them as had the other necessary qualifications possessed the franchise of electors, on equal terms with other citizens."[3]

Now, as one follows Judge Curtis' argument upon this question, he cannot help being surprised at his conclusions. He admits that the term citizen as used in the Constitution in the clause in question, means citizens of the United States, and argues that "as free colored persons born within some of the States are citizens of those States, such persons are also citizens of the United States;" that such citizens, residing in any State are the citizens meant by the Constitution and so may sue and be sued in the Federal courts; and that the fact that

[3] 19 Howard, 572.

Scott was of African descent, and that his ancestors were sold as slaves, shows nothing, therefore, inconsistent with his citizenship of the United States.[4] That is, the exact opposite of the present law under the fourteenth amendment, "that there was no such thing as a citizen of the United States, except as that condition arose from citizenship of some State;"[5] and, such being true, that the framers and adopters of the Constitution, in the use of the word citizen in the Federal jurisdiction clause, imposed upon the eight States and all others thereafter to be admitted the *standard of citizenship recognized by the five.* This is nothing short of the argument that because a thing is true of a part it is true of the whole, a falacy requiring no astuteness to detect. For, as Judge Curtis tacitly admits, if, under the Articles of Confederation and subsequently at the adoption of the Constitution, of the thirteen colonies, later States, eight recognized as the definition of a citizen such marks as did not include free negroes; and five recognized such as did include the free negro, the Constitution and the parties adopting it being silent *as to which standard measured its word citizen,* it is clear the court could not do otherwise than adopt and apply one of the two. They were so absolutely diametrical that there was no middle ground.

Now, it seems to me, aside from the internal evidence of the Constitution in part relied upon by Chief Justice Taney, that the history of the times, the laws of all the States both at the adoption of the Constitution and subsequent thereto, aside from the unreasonable proposition that the standard of the minority had been adopted over that of the majority and that without specific evidence, and the writings of eminent lawyers, leave no room to doubt as to the correctness of these two propositions.

As we take a survey of the field it is important to bear in mind that the question of jurisdiction resting upon citizenship, as presented by the admitted facts of the plea, stood

[4] 19 Howard, 588.

[5] U. S. vs. Anthony, 11 Blatchf. (U. S.) 200.

upon *two propositions.* Either was fatal to the jurisdiction which Scott invoked. Than the one indicated the other was that to be a negro was *prima facie* evidence of *slave birth,* and that through life the *presumption of slavery continued to follow the negro.* Admittedly such a person, that is one who was a negro and born a slave *and who did not counteract the presumption that he continued a slave,* was not the citizen who could sue and be sued as authorized by the Constitution. Now Scott, Taney and the majority contended, in admitting the facts of the plea had admitted, in legal effect, that he was born a slave. Since the dissenting judges based their argument upon the position that only such negroes as were *free native* born were citizens of a State and therefore of the United States and hence the citizens who could sue as provided in the jurisdiction clause, the force of the position of the majority could not be escaped. No one, therefore, questioned that if Scott, in admitting the truth of the statement in the plea, had admitted either literally or in legal effect that he was born a slave, then the burden was upon him to establish his citizenship in some other way than by birth. The dissenting judges sought to escape the result of the presumption in such cases, by asserting that the plea did not either actually or in legal effect allege that Scott had been born a slave.[6] But the majority of the court held firmly to the position that Scott, being in a slave State at the time of suit brought, and that, by admitting the statements of the plea, he admitted that he was of pure African descent, and that his ancestors were American slaves, thus admitted that he, too, had been born a slave; and for the reason that *to be a negro was to be presumed a slave,* and of course born a slave.

Now, if this was the existing and applicable presumption, since Scott, upon the question of jurisdiction in the trial court, made no effort to rebut or remove it, upon the facts of the plea it appeared that the trial court was without jurisdiction.

[6] 19 Howard, McLean's argument, 532; Curtis' 569.

There are many presumptions in our law, and we presume many things in the business world. If I sell a horse I am presumed to have the title to him; every man is presumed to be sane; at the creation of the Constitution all white persons were presumed to have been born free; and many such. I may not have had the title to my horse; the man of whom I bought my farm may have been mentally unbalanced, &c. But, being in possession, if I sell a horse the burden is upon him who alleges my want of title to *overcome* the presumption in my favor and to establish as a fact his charge. Until he does so the court will protect me in quietly resting upon the presumption. All presumptions will be treated as conclusive by courts *until the contrary is shown*. So in the days of slavery all negroes were presumed to be born slaves, and *a fortiori* when it was shown that there had been legal slavery in the ancestral line. When it was admitted that a person was a negro and that he was of slave parents, even remotely in the ancestral line, the burden was upon him to show that the slavery had been terminated. In denying this fact those who agreed with Mr. Justice Curtis committed a blunder which vitiated the conclusions which they wished to establish.

The evidence upon this question of presumption may be noticed first, because it is important light upon the word citizen as used in the Constitution.

Judge McLean, concurring with Curtis in the contention that Scott was presumed to have been born free,[7] directs attention to the rules maintaining in the Southern States. In doing this he furnishes evidence destructive of what he desired to establish. True, there was no source from which he could have drawn support, and it is almost pathetic to watch him pull down upon his own head the structure under which he professed to find shelter. In referring specifically to the law in Tennessee, he ignored the rule which his own court had theretofore ratified. In 1834 the Supreme Court of the United States decided: "It is admitted to be a settled rule in

[7] 19 Howard, 532.

the State of Tennessee that the issue of a female slave follows the condition of the mother," pointing out that this condition followed as "matter of course" and that a child born of a mother who was a slave only for a term of years became an absolute slave. As to each of these propositions McLean himself, participating in the decision in 1834, assented along with such associates as Judge Story of Massachusetts.

A full examination of the Tennessee cases, beginning with Abraham Vaughn vs. Phoebe, "a woman of color," decided by the supreme court of Tennessee in January, 1827, down to Bennett vs. the State, decided by the same court in March, 1852, not only refutes McLean but supports the principle upon which the majority acted. In 1815 that State had provided a special tribunal which was given exclusive jurisdiction over cases in which negro slaves were charged with petit larceny and kindred offences. A few months before the case reached the higher court, a person was indicted in the proper court at Memphis, and was described as "a negro of black complexion." The indictment was wholly silent as to the negro's condition, as slave or free, and there was no proof, and consequently nothing in the record, to show whether the accured was a slave or a free negro,—unless there were some legal presumption growing out of the allegation that the accused was a negro. So here the question of presumption was directly in point, and was the only point. Said the supreme court: "In a community where the almost universal condition of the *black man* is that of slavery, and where his complexion indicates his *social position* with almost as infallible certainty as it does his race, his color is to be regarded, in the absence of all other evidence, as *prima facie* proof of slavery. This presumption is of general application, and in this, as in other cases, is to stand until repelled by proof."[8]

Previous to the Dred Scott Case, and before the questions which it involved became so important to the Republican and Free-State parties, no other judge in America stated

[8] 31 Tenn. Repts. (Cooper's Edition) 411.

more clearly or followed more consistently this rule presuming all negroes slaves especially when in slave territory, than did Mr. Justice John McLean who so strangely forgot his own rulings when he came to pass an opinion in the Scott case. While out on his Federal circuit in December, 1842, in delivering the opinion of the court in Jones vs. Vanzandt,[9] he said: "In Kentucky, and in every other State where slavery is sanctioned, every colored person is presumed to be a slave. This presumption arises from the nature of their institutions, and from the fact that, with few exceptions, all the colored persons within those States are slaves." Again in 1853, in Miller vs. McQuerry,[10] he re-iterated and enforced the same law. In Menard vs. Aspasia, writing in 1831 the opinion of the Supreme Court he said that, "beyond dispute, the principle of the civil law" was that the "slavery of the mother of Aspasia being established" "the offspring must follow the same condition."[11] And so we find him consistently through his long period of service down to the Dred Scott Case. There and there only he overruled himself, broke all precedents, and offered nothing substantial to justify his iconoclasm. In 1853, just a very short time before the Scott case, he announced another plain and universal doctrine: "The Supreme Court has long since held that that court and its judges recognize, without proof, the laws of the several States and Territories." Now, since he admitted that "there is no slave State, where the existence of slavery is *not* recognized and maintained by numerous statutes and judicial decisions," every candid mind is bound to admit that he and the court were unavoidably obligated to recognize and enforce all legal presumptions growing out of those laws and recognized by those decisions. Having sued in the slave State of Missouri and admitting that he was a denizen thereof, having admitted his ancestors to have been negro slaves, all the presumptions in-

[9] 2 McLean's Circuit Court Reports, 607.

[10] 5 McLean's C. C. R. 484.

[11] 5 Peters, 513.

cident to slave conditions applied to Scott's case, were part of the law and needed no proof before the Supreme Court of the United States.

This was true especially in States where slave labor was legal, and when we turn to those States upon which Mr. Justice Curtis relied for establishing his contention as to citizenship we also find that it was not only true as to each of them but that the fact that they afforded free negroes some of the rights of citizens did not indicate that such negroes were regarded as citizens in the sense which that word in the Constitution undoubtedly was meant to convey.

At an early day New York provided in her election law: "That whenever any black or mulatto person shall present himself to vote at any election in this State, he shall produce to the inspector or persons conducting such election, a certificate of his freedom, under the hand and seal of any one of the clerks of the counties of this State or under the hand of any clerk of any town of this State." Before such person could obtain such certificate, he must make proof of his claim to freedom. When he presented such certificate and offered to vote, he was not even presumed to be the person described therein; the whites had the legal right to require him to make oath that he was the person described in the certificate which he offered.[12]

March 26, 1783, Massachusetts passed a law forbidding "an African or negro" to tarry within the Commonwealth for a longer time than two months, unless such persons could produce a certificate from the Secretary of the State of which such persons claimed to be a citizen showing that he was such; and where such negro did not have the required certificate it was further provided that "upon complaint made to any justice of the peace of this Commonwealth, that any such person has been within the same more than two months, the said justice shall order the said person to depart out of the Commonwealth; and in case that the said African or negro shall not

[12] See Laws of New York in force in 1813, p. 205.

depart as aforesaid, shall commit the said person to any house of correction within the said county, there to be kept at hard labor agreeably to the rules and orders of the said house, until the Sessions of the Peace, next to be holden within and for the said county; and the master of the said house of correction is hereby required and directed to transmit an attested copy of the warrant of commitment to the said court on the first day of their said session; and if, upon trial at the said court, it shall be made to appear that the said person has thus continued within this Commonwealth contrary to the tenor of this Act, he or she shall be whipped not exceeding ten stripes, and ordered to depart out of this Commonwealth within ten days; and if he or she shall not depart, the same process shall be had and punishment inflicted," and so *toties quoties*.[13]

This statute of Massachusetts is one of the strongest proofs that homeless, friendless, free negroes from other States in the American Union had no rights which the white man of Massachusetts was bound to respect so far as citizen rights are defined and protected by the Constitution.

Next as to New Jersey. In March, 1798, included in her revised laws of 1821, she passed a law which provided: "No free negro or mulatto, of or belonging to any other State in the Union, shall be permitted to travel or reside in this State, without a certificate from two justices of the peace of such other State, that such negro or mulatto was set free, or deemed and taken to be free in that State." With reference to negroes or mulattoes of New Jersey the law imposed a similar requirement before they were permitted to travel outside of the county in which they resided. Along with this law the act of March 17, 1798, recognized, legalized and continued her existing slavery.[14]

Nothing can be plainer than that notwithstanding New Jersey gave free negroes a few of the privileges accorded to *citizens* she recognized the burden resting upon them to

[13] General Laws of Massachusetts to 1822, v. 1, 324-5.

[14] Revised laws of New Jersey, 1821, 369 to 377.

remove the presumption arising against them solely on the ground of *color*. And the fact that these laws, as did similar laws in other Northern States, applied to free negroes in and of the State, traveling from one county, sometimes district, to another, shows that the law was made with no view to fugitive slaves from other States, as apologists for these anti-negro laws have sometimes claimed. The question was simply one between the white man of the North and the free negro, regardless of the rights of citizens of the slave-labor States.

In North Carolina, from her earliest days, as her supreme court decided in 1828, the presumption of slavery arises from "a black African complexion."[15] There is nothing in her early adjudications which indicates that native born free negroes were citizens in the sense in which white people are citizens in the Federal Constitution's use of the word citizen; and it was not until 1838 that her highest court decided that free negroes were citizens of the State.[16] However little light it furnishes upon the meaning of the word citizen as used in the Federal Constitution, it is interesting that some of the members of the North Carolina constitutional convention of 1835 believed that the free negro, as was pointed out had been done in other States, "should not be politically excommunicated and have an additional mark of degradation fixed upon him, solely on account of his color," and that such persons should be recognized "as a part of the body politic;"[17] and that of the few States permitting free negroes to vote, but under restrictions not imposed upon the whites, North Carolina was the last, prior to the war between the States, to take from the free negro the suffrage privilege.

One looks among the legislative provisions, other than that under certain conditions free negroes had the privilege of voting, and adjudications of New Hampshire in vain to

[15] Scott vs. Williams, 15 N. C. 378.

[16] State vs. Manuel, 20 N. C. 25.

[17] Proceedings and Debates of the Convention (Raleigh, 1836), 80.

find confirmation of the theory advanced by the dissenting justices.

Following emigration, the moulding influence of which was dominated by the spirit of the North, as it moved out to build new States, we get a most important practical construction of the word *citizen* as used in the Constitution.

In her territorial days Indiana began to build upon the doctrine that the negro was no part of the body politic, and therefore not a citizen. She maintained this position until forced to abandon it by the present amendments of the Constitution, which have given us upon this point an entirely new and materially different Constitution. In 1839 the supreme court of the State decreed the constitutionality of her law entitled: "An act concerning free negroes and mulattoes, and slaves." This law required free negroes or mulattoes coming into Indiana to give bond for their good behavior and not to become a public charge as poor persons. Failing or refusing to give the required bond, the negro was to be sold into slavery for a period of at least six months at a time "for the best price in cash that can be had."[18] And so until he left or spent a life of slavery or complied with the law. Nor was his right to remain as any freeman to be determined by a jury; a justice had jurisdiction of such offences (!) against the white man's superior rights; and the justice was fully empowered and required, in the event the negro was not sold as required by the law, to return such negro "to the State where he was last legally settled."[19] In 1840, in Baptiste vs. The State, an instance of an appeal from a sale into such slavery as this law provided, came before the Indiana supreme court, in which a "free man of color" sought to enforce his (!) right to seek his own happiness in whatsoever State he might elect, to enjoy the same privileges of home and protection as the free citizens of the several States, and to receive the earnings of his own labor, but the court held that the white man who

[18] 5 Blackford's Ind. Repts. 285.

[19] Ib. 283.

had purchased him at the sale pursuant to this law had the legal and superior right to hold him and compel his service just as slaves were held and compelled to serve in the regular slave States of the South, except of course the possible expiration of the term of service after the negro had atoned for this crime of attempting to live in Indiana! Again in Hickland vs. The State, and in 1847, the highest court of the State reaffirmed this law.[20]

From her earliest days down to the Dred Scott decision the anti-negro laws of Illinois rested upon the non-citizenship of the negro—and so even regardless of his ancestral slave status. Many discriminations against free negroes from other States who went to Illinois fill her statute books and find support by her courts. Such persons were required to produce a certificate of freedom issued by a court in the State from which the negro emigrated, to give bond not to become a charge as a poor person, &c., &c.

February 12, 1853, in revising her anti-negro laws Illinois passed another act "to prevent the immigration of free negroes into this State," so the caption informs us. November, 1855, a negro having appealed from the judgment of the lower court amercing him in a fine for violating this law, the supreme court said: "The offence consists in 'coming into this State and remaining ten days, with the evident intention of residing in the same.'"[21]

In 1804 Ohio passed a law that "no black or mulatto person shall be permitted to settle or reside in this State, unless he or she shall produce a fair certificate from some court within the United States, of his or her actual freedom;" and under the law of 1807 bond, in addition to the proof of freedom, was required before a free negro could lawfully remain in the State. Her first constitution conferred the right to vote upon whites only, which denied that a negro was even a person in the sense in which that word is used in the Ordi-

[20] 8 Blackford, 365; see R. S. 1838, 418-19, for one of the statutes.

[21] Torrey vs. The People, 17 Ill. Repts. 105.

nance of 1787. *Color,* in Ohio, raised more than a presumption of slavery; even when known to be free it was a badge of isolation, a mark of exclusion from both privileges of citizenship and the primary and basal right of freedom, which is change of residence at will. Under her law "color alone is sufficient to indicate a negro's inability to testify against a white man," said her supreme court in 1831.[22]

In December, 1842, Justice Read of that same court, in Thacher vs. Hawk, said: "It has always been admitted, that our political institutions embrace the white population only. Persons of color were not recognized as having any political existence. They had no agency in our political organizations, and possessed no political rights under it. Two or three of the States form exceptions. The constitutions of fourteen expressly exclude persons of color by a provision similar to our own; and, in the balance of the States, they are excluded on the ground that they were never recognized as a part of the body politic. . . . Indeed, it is a matter of history, that the very object of introducing the word *white* into our constitution, by the convention framing that instrument, was to put this question beyond all cavil or doubt, by, in express terms, excluding all persons from the enjoyment of the elective franchise, except persons of pure white blood.

"During our Territorial organization, although the Ordinance and Territorial organic Act, designating the qualifications of electors, employed the phraseology—'all free male inhabitants,' &c., yet no negro, or person of any degree of black blood, was ever permitted to vote. The fact is familiar to the old inhabitants, who resided here during the Territorial organization.

"Judge Burnet, who is as familiar with the early history of Ohio as any man in the State, and was engaged in the practice of law in the Territory, and had been prominently connected with the administration of its affairs, remarks, in one of his historical letters, published in the transactions of

[22] Calvin vs. Carter, 4 Hammond's O. R. 351.

the Historical and Philosophical Society of Ohio, vol. 1st, pt. 2d, page 111:

". . . 'the result of those discussions in the constitutional convention, was an abandonment of all the propositions which had been made, and a general conviction that a constitution should be made for the free white population of the district, who, alone, were represented in the convention; that its phraseology should be so guarded as to show that people of color were not considered as parties to the compact; and, as they had no agency in its formation, so they should have none in its administration.'

". . . Hence, we find, so early as 1804, followed up by another act in 1807, statutes discouraging the emigration of blacks into our State, and imposing upon those among us such conditions and restrictions as would induce the vast majority of them to quit the State. Thus, we have denied them all constitutional right to remain even in the State. . . .

"This exclusion of persons of color, or, of any degree of colored blood, from all political rights, is not founded upon a mere naked prejudice, but upon natural differences. The two races are placed as wide apart by the hand of nature as *white* from *black*, and, to break down the barriers, fixed, as it were, by the Creator himself, in a political and social amalgamation, shocks us, as something unnatural and wrong. It strikes us as a violation of the laws of nature. It would be productive of no good. It would degrade the white, if it could be accomplished, without elevating the black. Indeed, if we gather lessons of wisdom from the history of mankind—walk by the light of our experience, or consult the principles of human nature, we shall be convinced that the two races never can live together upon terms of equality and *harmony*."[23]

These regulations were the work of men from the North.[24]

Turn now to that splendid country covered by the present State of Oregon. Though not precedent, this action

[23] 11 Stanton's Ohio Rep. 384-5.

[24] Ewing, Northern Rebellion and Southern Secession, 69 et seq.

of Oregon, being the result of *Northern influence*, is all the more important. In the constitution which her people ratified in 1857, art. I., sec. 35, we read: "No free negro or mulatto not residing in this State at the adoption of this constitution, shall come, reside, or be within this State, or hold any real estate, or make any contracts, or maintain any suit therein; and the legislative assembly shall provide by penal laws for the removal by public officers of all such negroes and mulattoes, and for their effectual exclusion from this State, and for the punishment of persons who shall bring them into the State, or employ or harbor them."

December 9, 1857, Governor Geo. L. Curry certified that 8,641 free white citizens of Oregon had voted in favor of this provision, while only 1,081 opposed it.[25] And this constitution was drafted by a convention of sixty members, one-fourth of whom were lawyers! The members are said to have been "men of talent, learning and experience, men of great individuality, of character and strong common sense—men of high courage and strong convictions of duty."[26]

As can readily be gathered from the decisions by the supreme court of California, some of which are quoted in another connection, that State assigned to the negro a status based entirely upon his non-citizenship.[27]

Just a few months before the Dred Scott decision the Northern emigrants in Kansas drafted and ratified a constitution upon which they proposed to build a *free* State—but for free *white* people only. They held that a free negro, and above all a slave, was not a citizen in the sense in which that word is used in the Constitution of the United States, so their constitution forbade the settlement of free persons of color in the State.[28] And this provision was ratified by the Northern element by popular vote of 2,223 to 453![29] No

[25] Gen. Laws of Oregon, 1845-64, 129.

[26] Gov. W. P. Lord, in Fortieth Anni. of Ore., 14.

[27] Compiled Laws and Acts of Calif., 1850-53, 233.

[28] Von Holst, 5 Const. and Pol. Hist. U. S. 168.

[29] Chas. R. Little, New Cent. Hist. Kansas, 279.

wonder Gov. Walker, in May, 1857, exclaimed that if such persons were citizens of the United States "they could not be constitutionally excluded or exiled from Kansas."[30] Yet State legislatures of the North and in great numbers leading men of that section supported, aided, abetted or fought in Kansas open rebellion against the Federal troops to maintain that principle.[31]

Turning once more to the older States.

In 1833 Connecticut enacted a law forbidding the setting up or establishment of any "school, academy, or literary institution, for the instruction or education of colored persons, who are not inhabitants of this State." The alleged grounds of the law were that such institutions tended "to the great increase of the colored population of the State, and thereby to the injury of the people." In October of the same year a case raising the question of the validity of this law came before Hon. David Daggett, chief justice of the supreme court of errors. The defendant insisted that the law was unconstitutional because in violation of Art. 4, sec. 2 of the Constitution of the United States, which provides that, "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." The case rested upon this claim. The court instructed the jury:

"The Constitution of the United States is above all other law,—it is emphatically the supreme law of the land. . . . does this [school law] . . . violate the Constitution of the United States? . . . The law extends to all persons of color not inhabitants of this State . . . The persons contemplated in this act are not *citizens* within the obvious meaning of that section of the Constitution of the United States which I have just read. Let me begin by putting this plain question: Are *slaves* citizens? At the adoption of the Constitution of the United States, every State was a slave State. . . We all know that slavery is recognized in that Constitution; it is

[30] 5 Kansas Hist. Col. 44.

[31] Northern Rebellion and Southern Secession, 142 to 240.

the duty of this court to take that Constitution as it is, for we have sworn to support it. . . . Then slaves were not considered citizens by the framers of the Constitution. . . .

"Are *free blacks* citizens? . . . To my mind it would be a perversion of terms, and the well known rules of construction, to say that slaves, free blacks, or Indians were citizens, within the meaning of that term as used in the Constitution. God forbid that I should add to the degradation of this race of men; but I am bound, by my duty, to say that they are not citizens."[32]

In the case of Hobbs vs. Fogg the State of Pennsylvania furnished another strong precedent for the decision of the Scott case. At the election in 1835 a negro offered to vote. Solely on account of color, the judges of election refused the privilege. The negro insisted that "as a freeman and citizen of the State" the provisions contained in the State constitution and laws entitled him to the right of suffrage. As Chief Justice Taney indicated in September, 1858, this case is all the more important because "of the just weight and authority of the court by which the opinion was given;" and because "so far as the condition of the African race in this country is concerned, and the rule of interpretation which must be applied to public instruments, it maintains precisely the same principles which this [United States Supreme] Court" sustained in the Scott case.

The lower court, at which, strange to say, a judge by the name of Scott presided, held that the judges of election were liable in damages for refusing the negroes a vote. The judges justified themselves upon the ground "that a free negro or mulatto is not a citizen within the meaning of the Constitution and law of the United States, and of the State of Pennsylvania, and, therefore, is not entitled to the right of suffrage. . . . " "This," said the court, "is the question . . . which this suit was brought to settle."[33] At that time the

[32] Crandall vs. The State, 10 Conn. Rep., 339, 340, 344, 345, 347.

[33] 6 Watts, 553, 554.

supreme court of Pennsylvania was composed of five judges. The chief justice delivered the opinion, to which there was unanimous assent. The student should read the full opinion. The court said: "But in addition to interpretation from usage, this antecedent legislation [which the court had just discussed] declared that no colored race was party to our social compact. Our ancestors settled the province as a community of white men; and the blacks were introduced into it as a race of slaves; whence an unconquerable prejudice of caste, which has come down to our day . . . Consistently with this prejudice, is it to be credited that parity of rank would be allowed to such a race? . . . I have thought fair to treat the question as it stands affected by our own municipal regulations without illustration from those of other States, where the condition of the race has been still less favored. Yet it is proper to say that the second section of the fourth article of the Federal Constitution, presents an obstacle to the political freedom of the negro, which seems to be insuperable."

Now then, in addition to the presumption that a negro of pure African blood whose ancestors had been American slaves, was presumed to have been born and to have continued a slave, these laws show that all the States had given to the Federal Constitution, from the days of its ratification down to the Dred Scott decision, a practical interpretation agreeing unanimously that a negro, though free and a native of a State, was not such a person as the word citizen defines as that word was used by the framers of the Constitution. For, as the Supreme Court of the United States has said, "citizens of the United States" must have "the right to pass and repass through every part of it without interruption as freely as in their own State."[34] Therefore, certainly, he is not a citizen of the United States to whom this right of passing and repassing was denied for some hundred years and down to that great volcanic upheaval which resulted in the present constitu-

[34] Crandall vs. Nevada, 6 Wallis, 49.

tional definition of a citizen,—*thus by amendment making for him a status not enjoyed under the original Constitution.*

Now, there being nothing in the history of any Southern States not mentioned in this discussion, and nothing to be found in the North, *even tending to show a different construction of the Constitution,* it is important to emphasize the fact that this universal American definition of the negro's civil status is of the greatest weight in finding the meaning of the word citizen as used in the Constitution. There being, at the time of the Dred Scott decision, no definition of the word in the Constitution itself, this method of reaching the meaning by historical evidence is approved by highest authority. Mr. Justice Curtis, citing previous decisions of the Supreme Court, said: "A practical construction, nearly contemporaneous with the adoption of the Constitution, and continued by repeated instances through a long series of years, may always influence and in doubtful cases should determine the judicial mind, on a question of the interpretation of the Constitution."[35] This method, followed since the earliest days, yet fully maintains, and is regarded as of the most forcible nature.[36] The reason of the method, too, should not be overlooked; and this is that, as was emphasized in an earlier chapter, in interpreting the Constitution we are to place ourselves as nearly as possible in the condition of the men who framed that instrument. If the Constitution as interpreted by the court was not what it should have been, the remedy lay not with the court but with the people,—*and their remedy was by amendment.*

It will be interesting to notice one instance of such a contemporaneous and subsequent practical construction of the Constitution furnished us in the history of Virginia.

January 2, 1776, in the secret instructions to General Clark, preparatory to those memorable and glorious "cam-

[35] 19 Howard, 616.

[36] McPherson vs. Blacker, 146 U. S. 27; Burrow-Giles Lith. Co. vs. Sarony, (1884) 111 U. S. 57; The Laura, 114 U. S. 416; Fairbank vs. the U. S., (1901) 181 U. S. 307; Missouri vs. Illinois, (1901) 180 U. S. 219.

paigns, 1776-9 and 1780, whereby he gained for the Colony of Virginia a domain later known as the Territory of the United States northwest of the river Ohio, and now known as the States of Ohio, Indiana, Illinois, Michigan and Wisconsin," issued by Governor Patrick Henry of Virginia, Clark was ordered "to attack the British post at Kaskasky" reduce it and take possession of both its military stores and the surrounding country. Then the governor instructed: "If the *white* inhabitants of that post and the neighborhood will give undoubted evidence of their attachment to this State (for it is certain they live within its limits) by taking the test prescribed by law, and by every other way and means within their power; let them be treated as fellow citizens, and their persons and property duly secured; assistance and protection against all enemies whatsoever shall be afforded them, and the Commonwealth of Virginia is pledged to accomplish it."[37]

After many delays and numerous disappointments Clark succeeded even beyond expectation, and shortly reported the surrender of the country to Virginia. October, 1778, the general assembly of that State passed an act establishing a government for the new territory. Its citizens, fellow citizens of Virginia, were defined to be white people.[38]

In May, 1779, Mr. Jefferson prepared for the consideration of the general assembly of Virginia a bill defining her citizenship. It provided that "all white persons born within the territory of this State," &c., and certain white foreigners, only, could or should be her citizens; and "that the free white inhabitants of all of the States, parties to the American confederacy, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all rights, privileges and immunities of free citizens in this commonwealth, and shall have free egress and regress to and from the same, and shall enjoy therein all the privileges of trade and commerce, subject to the same

[37] Illinois Historical Collections, v. 1, 192.

[38] Ib. 203, 9 Henning, Statutes of Virginia, 552.

duties, impositions and restrictions as citizens of this Commonwealth."[39]

At the time of the passage of this law, Jefferson, its author, was just out of the National Congress, having resigned his seat in that body to take one in the general assembly of his own State. When the bill passed he had retired from the latter body to take other positions of trust, and the bill had gone through under the patronage of such men as George Mason, who championed it warmly. No two men in America were better able to know or more honest to declare who were the citizen "parties to the American Confederacy."[40]

Outside of the judiciary and legislatures, Northern statesmen and lawyers hed for many years gone entirely as far as did the opinion as Chief Justice Taney worded it. An instance of this class of writing is furnished by John F. Denny, of the Chambersburg, Pennsylvania, bar. About 1834, he published a pamphlet, "An Enquiry into the Political Grade of the free Colored population under the Constitution of the United States." Much as did Taney, he reviews the degraded condition of free negroes, points out that no State treated them as the political equals of the whites and then says: "Can it be that the Constitution binds so loathsome an excrescence to the vitals of any State? If so, that charter has certainly failed to secure some of the chief benefits for which it was formed . . . The term citizen is nowhere defined in the Constitution; it was employed by the convention as a word of known and established meaning—descriptive of *all who are capable of citizenship in all of the States, with a due regard to the local qualifications in each.* They were viewed as an addition to the *property* of the State, but never as an effective accession to its *numbers.*"

Now, from such legislation, in these judicial decisions, from such official opinions, and from the writings of distinguished jurists and statesmen, from practical constructions outside of

[39] 10 Henning, 131.

[40] Washington's Jefferson's Compl. Works, v. 1, 40. See also Att'y-Gen. Wirt's opinion, 1 Opps. Att'ys-Gen. U. S. 507.

the judiciary begun before the Constitution, contemporary with it, and continued through the years down to the amendments of the Constitution *since* the war between the States,—we get the meaning of the word citizen. Nothing in our history refutes this great volume of evidence; while even much more. merely cumulative, might be adduced to prove that Taney and the majority were correct in holding that negroes of pure African blood, whose ancestors had been American slaves, were not such citizens as were meant when our Constitution gives United States courts jurisdiction over suits between citizens of different States. Too, this evidence proves that he and the court were again right in holding that at the time of Scott's suit his admission that his ancestors were slaves, that he was a negro of pure African blood, and that being in Missouri, a slave State, raised against him the presumption that he had been born and continued to be a slave.

That the majority of the court, concurring in the opinion as written by Taney, in placing itself upon the legal presumption stood upon the law, Mr. Justice Curtis himself had furnished the clearest precedent. It is strange that he forgot it when he came to decide this case. In 1851 while out on his Federal circuit, sitting in Massachusetts, in the case of the United States vs. Morris, involving the determination as to the slavery of the person on trial, he said: "Suppose the government were to attempt to trace the pedigree of this man back to 1785. The first step would be to show, by persons who knew them, that some person spoke of and treated as her son, and that he spoke of and treated her as his mother, or that he was reputed among those nearly connected to be her son, and thus go back to some maternal ancestor in 1785; and, having arrived at that point, the next step would be to prove that that ancestor was a slave; and I suppose that it would hardly be doubted that this last could be proved by showing that she had marks of African descent, and was bought and sold as a slave, and held as such all her lifetime."[41]

[41] 1 Curtis, C. C. R., 46.

The presumption which Judge Curtis admitted and enforced when sitting in Massachusetts, he denied and refused to enforce as to this case from Missouri, a slave State; and, being a State where slave labor was recognized by law, a State where the presumption was doubly applicable and in which and as to which it had never been questioned until the principles of the Republican party were being crushed into powder by the logic of Taney.

DRED SCOTT

Original Oil Painting Owned by the
Missouri Historical Society

V.

SCOTT A SLAVE BY ILLINOIS LAW.

With the judgment that Scott was not such a citizen of Missouri, upon the facts set out in the plea to the jurisdiction of the trial court, as was entitled to sue in a Federal court, the Northern free-soil or Free-State party could not have found fault without the most complete stultification. That the negro, the *free negro* regardless of ancestral conditions, was not a *citizen* in the sense in which that word is used in the Constitution of the United States, had been the doctrine and practice of the North since the earliest days. No matter what name the anti-negro Northern movement assumed, that persistently practical construction of the Constitution was the center about which all other questions were clustered. The Free-State party rested upon it as chief corner stone. Men of means and ability of the North led the ranks of that party and in 1855 to 1857 sent hordes of emigrants to settle Kansas with white people only. Backed by the powerful capital of New England, abetted by dangerous numbers of intelligent and influential Northern men, these emigrants set up a "free State" resting its chief claim upon the exclusion of the free negro, though born free; and to maintain this construction of the Federal Constitution, with guns supplied from the North, they waged a literal bloody rebellion against the United States.[1]

Experience in Kansas emphasized more than ever the advantage the North would enjoy could the Federal Government be brought again, as it had done in the enactment of the pro-Northern interdict of the Missouri Compromise

[1] See Northern Rebellion and Southern Secession.

law, to take the Northern emigrant under paternal guardianship. The advantage of this class legislation was pointed out by Judge McLean in a *confidential* letter to a friend, written November 2, 1855. In the same communication he mentioned that the Dred Scott Case would be before the Supreme Court "next winter," saying that that court had decided "that slavery exists by virtue of the municipal law, and is local. The Constitution gives Congress no power to institute slavery; then there can be no slavery in the Territories; for there is no power but Congress which can legislate for the Territories. . . . I write to you in confidence. . . . It is better that my opinions should find their way to the public from the bench."[2] McLean was perhaps as able a politician as he was a judge. At the Republican national convention in Philadelphia, June 17, 1856, he received 196 votes for the Presidential nomination, and Stanwood says that he was regarded as a strong candidate, Fremont, who was nominated, having some difficulty to overcome the McLean influence.[3] Defeat seemed to indicate McLean's better politics; and, abandoning the position "that the Constitution confers upon Congress sovereign powers over the Territories," the anti-Democrats took the new cue. Rallying yet more strongly to the banner of the Republican party, by 1859, its standard in the hands of Lincoln, the anti-negro North with which the fanatical abolitionists had largely affiliated jeopardized its right to existence as a political power, though expressly declaiming that slavery in the South by the Federal Government should be made express and irrevocable, by adopting as its cardinal doctrine the claim that the Constitution *required* the Federal Government to prohibit at all times slavery in Territories. At the same time there was no abandonment of the position that, as Judge McLean said in his dissenting opinion: "If Congress should deem slaves or *free colored persons* injurious to the population of a free Territory, as conducing to lessen the value of public lands,

[2] Bibliotheca, Oct., 1899, 378-9.

[3] Stanwood, A Hist. of the Presidency, 271.

or on any other ground connected with the public interest, they have the power to prohibit them from becoming settlers in it."[4]

Hence when the court passed from the question of citizenship as that question was presented by the special plea, and decided the other questions that were presented by the record and which grew out of the facts upon which Scott relied for sustaining his claim to freedom, the Republican party found itself throttled by the greatest arm of the Federal Government; and all factions of the anti-negro party saw their greatest hope shattered by the very power that they had furnished the money to reach in this case. So both the anti-free negro people and the anti-slavery fanatics lost more in the decision of the court upon the facts of Scott's case as admitted at the trial, and certified in the record before the Supreme Court, than they had gained in the decision upon the question of citizenship as it was presented in the special plea. Smarting under the sting of defeat, burning with the keenest disappointment, they plunged madly and inconsistently into a repudiation of each decision upon which the final judgment of the majority of the court rested. Driven to the wall by the irrefutable logic of Chief Justice Taney and the majority of the Supreme Court, rebellion hissed throughout the North and sophistry and misrepresentation were seized and weilded as the weapons with which to kindle popular indignation and to divert historical truths.

Scott, a legal slave under the Missouri law, was by his master, Doctor Emerson, carried to Rock Island, a military post in Illinois, and there held in slavery for about two years and finally returned to Missouri as a slave. While in Illinois the master was a sojourner, in the service of the Federal army, and liable to recall at a moment's notice. Perhaps the belief that Scott was on free-soil while thus in Illinois, has had as much to do with fostering the feeling that the Supreme Court had done him and the free labor States an injustice and had

[4] 19 Howard, 543.

pronounced a principle that would respread slavery, as any other one view of this great case. Some even yet assert that at that time Illinois was "doubly protected against slavery."[5] Hence in the interest of history a review of the Illinois law upon this question is here presented.

We find no examination of the Illinois law upon this point in the opinion of the court, because of the fact that the Supreme Court affirmed the lower State and Federal courts in the view that Scott, having been returned to Missouri as a slave, could not in that State enforce any status which must depend upon the law of another State. This was placed upon the well recognized ground that any law of Illinois that sought to destroy Scott's slave status existing under the laws of Missouri, was penal in its nature, and that no State would enforce penal laws of any other place in conflict with its own laws. It is settled that this principle is applicable between the States.[6] Too, as also pointed out by Judge Nelson in his concurring remarks, it was an established principle that even had Scott's status been that of a freeman while in Illinois, having been returned to Missouri and having brought suit there, slavery being recognized by her laws, the slave status certainly redintegrated. Nelson sustains this latter ground by showing that, contrary to the usual belief, a slave, though regarded, under Lord Stowell's famous decision, as free while in England, yet as Lord Mansfield of England held later in the case of the slave Grace, "on his return to his own country, the slave resumed his original character of slave." With this view, undoubtedly the settled Federal law,[7] Nelson shows Northern judges were in accord, quoting Story: "In my native State (Massachusetts), the state of slavery is not legal; and yet, if a slave should come hither, and afterwards return to his own home, we would certainly think that the local law

[5] Hill, Decisive Battles of the Law, 247.

[6] Wheaton's Int. Law (8th Ed.), secs. 113, 121; Wis. vs. Pelican Ins. Co., 127 U. S. 290.

[7] The Antelope, 10 Wheaton, 120; 2 Dodson (England), 250.

attached upon him, and that his servile character would be redintegrated."[8] Notwithstanding Judge McLean's claim,[9] the Southern States sustained this doctrine in all cases such as Scott's; and the cases cited by McLean rest upon facts in no true sense analogous to those in Scott's case.[10]

But as a question of history, was Scott really entitled to his freedom under and by virtue of the laws of Illinois? Did the Illinois laws impress upon him the condition and status of a freeman?

September 17, 1807, the Territory of Indiana, of which Illinois was then a constituent part, passed the indenture and registration law creating absolute slavery except its termination before the negro's old age. December, 13, 1812, Illinois having been made an independent Territory, her legislature continued the force and operation of the indenture and registration slave law. There was no further legislation on the matter while she remained a Territory; and in the constitution of 1818, under which she was admitted a State, she and Congress mutually confirmed the indenture law and the slavery then existing in conformity thereto and by virtue thereof. That constitution apparently further provided that thereafter there should never be involuntary servitude in that State—the indentured and registered slaves being intentionally untouched by the prohibition. On its face this looks like Illinois was preparing to encourage negro freedom,—but watch!

As a State Illinois began her anti-negro and pro-slavery laws in 1819. On March 30 of that year an act of her legislature was approved and went into effect providing: "That from and after the passage of this act no black or mulatto person shall be permitted to settle or reside in this State, unless he or she shall first produce a certificate signed by some judge or some clerk of some court in the United States, of his or her

[8] 19 Howard, 467, citing Story, Confl. of Laws, 396 a; 2 Kent's Com. 258 n; Chief Justice Shaw of Massachusetts in 18 Pick. 193; 1 Life of Story, 552, 558.

[9] 19 Howard, 558.

[10] See Guillemette vs. Harper, (S. C. 1850); La. Acts, May 30, 1846; Scott vs. Emerson, 15 Mo. 576; Com. vs. Pleasants, 10 Leigh, 732; Billy vs. Horton, 5 Leigh, 667.

actual freedom; which certificate shall have the seal of such court affixed to it."

And further: "That it shall not be lawful for any person or persons to bring into this State, after the passage of this act, any negro or mulatto, who shall be a slave or held to service at the time, for the purpose of emancipating or setting at liberty such negro or mulatto," etc.

And again: All negroes, "slaves and persons held to service excepted, residing in this State at the passage of this act," were required to register themselves *together with the evidence of their freedom.*

And the act further provided that no person could employ or hire any negro or mulatto not having the required certificate; and that slaves guilty of misconduct be punished by *stripes.* Contracts between master and servant were declared void; and it was provided that in cases of penal laws where free white persons were punishable by fine, slaves were to be punished by whipping "after the rate of twenty lashes for every $8." Negroes ten miles from the tenement of their master were subject to stripes, not exceeding thirty-five, such persons not having been sent by the master. Negro slaves being on the plantation or in the tenement of another than the master, not being sent on lawful business, were liable to receive "ten lashes on his or her bare back." No person could permit slaves to gather on his premises to the number of three or more "for the purpose of dancing or reveling either by day or night." Slaves so assembling were punishable by thirty-nine stripes "on his or her bare back."

January 17, 1829, this law was supplemented by an act which provided that negroes or mulattoes coming into the State and not having the required certificate of freedom should be "deemed runaway slaves or servants," be apprehended and, if not claimed by some owner, be hired out by the sheriff "for the best price he can get" for a period of one year; and then, if no owner claimed such negro, the sheriff should give a certificate of the facts, and upon presentation of that certificate

to the circuit court, that court could issue a certificate, whereupon such negro should be deemed a free person unless he should "be lawfully claimed by the owner or owners thereafter." This law further provided that no negro, "the property of any citizen of the United States, residing without the State," could institute in the court of Illinois a suit for freedom, and required the court to dismiss such action should it discover one pending.

March 1, 1833, an act of the legislature exempted persons from the penalty imposed by that section in the law of 1819 which forbade the bringing of negroes or mulattoes to the State for the purpose of emancipating or setting them free, on condition that such persons having incurred the penalty of that law should before judgment against them give the bond required, etc., and pay the costs of suit. But as this was specifically applied to the cases that had arisen under the law of 1819, it did not affect the law of Feb. 1, 1831, which provided: "That hereafter no black or mulatto person shall be permitted to come into and reside in this State, until such person" shall have presented his certificate of freedom and have given bond with security as provided by the act of January 17, 1829. And further: "Any person who shall hereafter bring into this State any black or mulatto person, in order to free him or her from slavery, or shall directly or indirectly bring into this State or aid and assist any person in bringing such black or mulatto person to settle or reside therein, shall be fined $100." This was the law, as well as the laws regulating slaves, providing for stripes on their bare backs, etc., during the time Scott was in Illinois,—and, in fact, until long after he had gone from the State.[11]

Now when we turn to the adjudications of the highest court of Illinois for the purpose of ascertaining the construction put upon these various anti-negro regulations, we find them not only sustained by the court but the admission that

[11] Laws of 1833, 457 to 465; 496; Acts 1831, 101.
The next regulation upon the subject was the act of Feb. 19, 1841, which applied only to negroes who were *born in the State* (Acts 1841, 189.), and provided no mitigation of the harsh rules of the earlier laws.

the purpose of such laws "may have been, and most likely was, to prevent the influx of that most unacceptable population," as the court said in Eells vs. The People, in 1843; and that, as the court went on to point out, "it matters not what the object was, the exercise of the power was within the legitimate scope of the Illinois authority." Too, we find that the court sustained along with the local slavery and anti-negro regulations the right of slave holders accompanied by their slave from other States to hold them as property while in the State with no intention of permanent residence, as Mr. Justice Lockwood pointed out in the same case.[12]

Now put your finger upon the provision of the State law as it was either in letter or spirit and as it was enforced by the highest courts of Illinois, under which Scott could have claimed freedom. He could not have been sold for one year for whatever price the sheriff who apprehended him might have been able to have obtained, for he was not a fugitive slave. That section of the law providing for the sale of negroes not having the required certificate was aimed at fugitives, and had in view, so the State supreme court in Thornton's case in 1849 said, "a proper regard to the rights of the citizens of other States" claiming property in such negroes. However, in the same case, basing its decision on the action of the Supreme Court of the United States in the famous case of Prigg vs. Pennsylvania, the highest court of Illinois held that that one section and provision of the law was wholly inoperative. Since the Supreme Court of the United States, upon a question of the construction of a State law, always follows the highest court of the State, and since this decision of the State court was based upon the action of the Supreme Court, had Scott undergone the penalty by which alone a negro not having the evidence of his freedom could purchase an uncertain right to remain in the State, it could not have availed him, having been decided inoperative. However, as Scott was not a fugitive; as no attempt had been made to apply that provision of

[12] 4 Scammon, 513, 517.

the law; and as the section authorizing such sale of fugitives and negroes not having the required certificate of freedom, was wholly inoperative, was the situation altered because of the fact that Scott was in the State by the will of the master who had carried him there for the purpose of holding him in slavery while upon temporary business in connection with the United States army, and with no intention of setting the negro free?

The answer must depend upon whether or not the State in order to punish the master in such a case could render inoperative the law's provisions forbidding emancipation by masters. That we may see the logic of the situation, notice again the settled law as laid down by the supreme court of the State in 1851 in the case of Owens vs. The People.[13] This was an action instituted by the State to recover the penalty of a bond given by a negro who had come from another State for the purpose of residing in Illinois, "the conditions of which were that he would behave himself in a decent manner, and act as the law requires toward all people in this State, and shall not become a county charge, then and in that case this bond to be void; otherwise to remain in full force and virtue." Hobbs, the negro, settled down, grew old and infirm, and the county in which he lived found itself compelled to expend the sum of *thirty-seven dollars* "for his support, nursing and maintenance." It was to reimburse itself for this outlay that suit was brought against the negro and the woman who was the security on the bond. The case, taken from the Marion circuit court on a change of venue, was tried in the circuit court of Williamson county, and judgment given against the negro and the surety for the sum of *one thousand dollars,* the full penalty of the bond. Thereupon the defendant appealed to the supreme court of the State. Announcing the settled law that court said:

"The statute in reference to negroes and mulattoes[14]

[13] 13 Illinois 59.

[14] Rev. Stats. ch. 75.

was manifestly designed to discourage the settlement of negroes within this State. The eighth section of that act inflicts a penalty on any person bringing a black or mulatto person into the State, in order to free him from slavery. The fifth section provides for arresting, imprisoning and hiring out any such person found in the State, not having a certificate of his freedom; and, although this section has been held to be invalid, in the case of Thornton, 11 Illinois, 332, by reason of its conflict with the exclusive jurisdiction of Congress over the same subject, still it is proper to refer to it, as indicating the design of the legislature in enacting the other sections of the same law. The first section declares that 'no black or mulatto person shall be permitted to reside in this State, until such person shall produce to the county commissioners' court, where he or she is desirous of settling, a certificate of his or her freedom, which certificate shall be duly authenticated in the same manner that is required to be done in cases arising under the acts and judicial proceedings of other States. And until such person shall have given bonds, with sufficient security to the people of this State, for the use of the proper county, in the penal sum of one thousand dollars, conditioned that such person will not, at any time, become a charge to said county, or any other county of this State, as a poor person, and that such person shall, at all times, demean himself or herself in strict conformity with the laws of this State.'

"The legislature never intended this State," the court goes on to say, "to become a rendezvous for negroes and mulattoes of every description, who could give the required bond, but limited the privilege of residing here to such only as could furnish the evidence of their freedom and then give bond and security."[15]

Now notice: If presence or residence in Illinois could have imparted to a slave the status of a freeman, it would have opened the most effective way for the evasion of the law for-

[15] Ib. 63, 64.

bidding a person to bring a negro to the State for the purpose of setting him free. To have declared Scott free because brought to Illinois and held in slavery, would have done for him what the master could not do, and would have exempted the master from liability to fine had he desired to free his slave. The penalty of the Illinois law was directed against emancipating a slave, and not against holding a negro in slavery in that State. The people of Illinois stood aghast not at the slave but at the free negro in their midst. Her citizens owned indentured slaves. Hence, Scott could not have been by an Illinois court or by any other adjudged free by reason of having been held in slavery in Illinois because such would have contravened the long enforced law of the State. Had it been held that Scott's master could not hold him there in slavery, he must then, as the law read and as the courts enforced it, have been ejected from the State on the ground that he did not have a certificate of his freedom, "duly authenticated in the same manner as that required to be done in cases arising under the acts and judicial proceedings of *other States,*" which would have been irrefutible proof that such a negro was yet a slave under the laws of the *other* State. Too, since it was unquestionable that Scott had no certificate, unless tolerated merely as a slave he was a trespasser while in Illinois, and to have allowed him any benefit as against his master on account of that stay, would have been permitting him the advantage of his own wrong, which is always abhorrent to all law. In eliminating a negro Illinois repudiated in the most emphatic manner his right to her protection, and gave express acknowledgment that he was the subject of some other State. Being the subject of some other power, and not permitted the privilege of her jurisdiction, Illinois could not invest him with a right.

Illinois did not permit the right of freedom as between the negro and the State to add free negroes to her population. Both the letter of the law and the presumptions upon which the courts acted in its enforcement were in favor of the slav-

ery of every person of negro descent. However, there are a few cases in her court reports that might mislead some, for in them the *obiter dictum* that all men, even negroes, are presumed to be free, is found.

One of the most peculiar of these decisions was rendered by that court in November, 1857. Its *obiter dicta,* in the face of the facts and the laws of the State, cannot fail to strike even the casual reader. In this case a slave escaping from his master, who held him under the Missouri law, was taken on board the Illinois Central Railroad at Cairo and carried to Chicago. Suit was instituted in the Illinois State circuit court in 1855 to recover the value of the fugitive negro and also for damages occasioned by the road in assisting his escape. Said the court: "The constitution of this State prohibits negro slavery, and, therefore, negroes within our jurisdiction are presumed free."[16] But that declaration was to save the railroad from damages, as no question between the State and the negro was involved.

As authority for this the court cites, first, Hone vs. Ammons.[17] In that case a citizen and resident of Illinois executed his note in purchase of a negro represented to be a slave, and who was at the time in the State. Of the four judges only two concurred in the opinion; the chief justice dissented *in toto* from the other members of the court. The only point upon which a majority of the court seem to have agreed was that no judgment could be given upon "a contract made in Illinois, for the sale of a person as a slave. . . . The contract sued on was made in Illinois, and the presumption of law is, was to be performed in Illinois. A part of this contract, the consideration of the note, was the sale of a negro in Illinois, as a slave" in 1848 or 1849. So the question as to whether or not the negro, the consideration of the note, was free or slave did not become material in deciding the case, most clearly, as Justice Trumbull showed. There was no proof that the negro

[16] 19 Ill. 44.

[17] 14 Ill. 29.

was not born in Illinois, or that he had ever been held in slavery in a slave State, or that Hone, who claimed to sell him, or any one else, had ever exercised "even the semblance of possession or control" in Illinois or elsewhere.

Baily vs. Commonwealth[18] was the next case cited. This case was heard in the lower court in September, 1839. Abraham Lincoln was the attorney for the appellant, and S. T. Logan for the appellee. It, also, was an action to recover the value of a note given in consideration of a negro girl who was alleged to be an indentured slave under the laws of Illinois; and the vendor promised to produce the papers of indenture. No title papers were ever produced; and, upon examination, none could be found; and the court said that the presumption was "she was free, and not the subject of sale."

In Kinney vs. Cook,[19] the court said the presumption is that "every person is free, without regard to color," and this the court in 1857 also cited. This was another action of debt. A negro had sued for wages which he claimed to be due from a citizen of Illinois for whom he worked. The negro proved his services, "without having adduced any testimony whatever of his freedom either by certificate or otherwise." The defendant relied upon this failure to prove freedom; and the question before the court turned upon whether or not, in such a case, the law would presume the negro free. Both the lower and the appellate court held that the plaintiff, the negro, for the purpose of that suit, was under no necessity to prove his freedom.

Now it will be observed that neither case arose from the voluntary carrying a negro to the State by a master from a slave State. So when the Dred Scott Case was before the courts, there was not a statute or a decision which was an authoritative precedent for holding that a negro slave being brought to the State as was Scott, would, in any event, or for any purpose, have been presumed free; on the contrary her bit-

[18] 3 Scammon, 71.

[19] 3 Scammon, 232.

ter and *enforced* statutes requiring *evidence* of freedom were most conclusive that her law was against him.

Had Scott any right to freedom under the Ordinance of 1787? Curtis said that "the Congress of the Confederation had no power to make such a compact nor to act at all upon the subject." So far as the Articles of Confederation was authority, this is undoubtedly true; and whether or not it had any validity on the ground of mutual consent of the States,[20] all agree it had none after the Constitution *except as authorized by that instrument.*[21] August 7, 1789, Congress acting under the Constitution, there being no other *source* of power "capable of operating within that territory after the Constitution took effect," affirmed the provisions of the Ordinance only in so far as Congress had power to legislate upon the subjects regulated therein.[22] Hence, if the Constitution gave Congress no power to destroy slave property in a Territory, no part of the Ordinance of force after August 7, 1789, contained an attempt at such destruction, words in the Ordinance, as originally drawn, to that effect being the merest surplusage. Territories within the limits of the Ordinance, after the Constitution, beginning with the slavery law of the Territory of Indiana in 1807,[23] down through the adoption and reenactment of this law by the Territory of Illinois,[24] treated the anti-slavery wording of the Ordinance as a surplusage and a nullity. These laws and this construction of the Ordinance were ratified by Congress and specifically declared to be in conformity with the principles of the Ordinance, when Congress sanctioned the constitution of Illinois, in 1818.[25]

The ordinance was a territorial regulation; after the several Territories of the Old Northwest became States, they

[20] 19 Howard, 435.

[21] 19 Howard, 617.

[22] 1 Stat. at Large, 50.

[23] Acts Ter. Leg., 1807.

[24] Hayes vs. Borders, (1844) 1 Gilmer (Ill.), 54.

[25] Poore, Charters and Consts. 446.

altered or adopted even the theretofore valid provisions of the Ordinance as suited the people. The validity of this action was sustained by the Federal courts and by the highest court of each State erected within the original Territory. To have given the anti-slavery wording of the Ordinance full force in Illinois while Scott was in that State, would have destroyed her anti-negro laws. Such a force not only was not but would not have been tolerated, and would have been entirely subversive of the reserved rights of Illinois as guaranteed by the Constitution of the United States. Too, such an application of the Ordinance would have destroyed the force of the indenture slave law affirmed in the Illinois constitution and ratified by Congress, and no law of that State has been more zealously upheld than that slavery provision.[26]

In full harmony with these decisions Judge McLean in 1838 announced the same principles.[27] In 1843 the superior court of Michigan decided: "The Ordinance of 1787, in my opinion, is no part of the fundamental law of the State since its admission into the Union. It was then superceded by the State constitution, and such parts of it as are not to be found in either the Federal or State constitutions, were annulled by mutual consent. . . . The Ordinance must . . . have been drawn with a view to the existing government under the Articles of Confederation. If the Constitution had been in operation at the time, it can hardly be supposed that the Ordinance would have been what it is; for a new, and in most respects, entirely different state of things existed under the Constitution, from what existed under the Articles of Confederation."[28] This principle by which the Ordinance was held inoperative after Illinois became a State, was sustained in Menard vs. Aspasia, decided by the Supreme Court of the United States in 1831, in an opinion written by Judge McLean

[26] McKinstry vs. Pennoyer, 1 Scammon (Ill.), 319; Bonn vs. Juliet, Ib., 258; Sarah vs. Borders, 4 Scammon, 345, 348; Eells vs. The People, Ib. 507.

[27] Spooner vs. McConnell, 1 McLean's Repts. 343.

[28] Walker's Mich. Chancery Rep. 163.

himself.[29] In 1885 the same court again decided, the entire court agreeing: "The Articles of Confederation ceased to exist upon the adoption of the Federal Constitution; and the Ordinance of 1787, like all acts of Congress for the government of Territories, had no force in any State after its admission into the Union under the Constitution."[30] From that day to this the principle remains sustained.

Neither the Ordinance of July 13, 1787, nor any law of the State of Illinois converted the slave status of Scott into that of a freeman. There being no other possible source of freedom, while in Illinois Scott remained a slave.

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[29] 5 Peters, 516.

[30] Van Brocklin vs. Tennessee, 117 U. S. 159; citing Permoli vs. First Munic. of N O., 3 Howard, 589, 610; Strader vs. Graham, 10 Howard, 82.

VI.

OBITER DICTA AND THE OPINION.

That some part of the opinion of the court is an *obiter dictum,* has been widely believed since the first effort to find an excuse for repudiating the binding and conclusive force of what the court had done. "Taney and the others went out of their way to deliver a series of *obiter dicta,*" is a statement that has long been the favorite weapon with which the attempt is made to defend the North—for the great numbers therein of the same mind make it proper to speak of it as a whole—against the nullification to which that section and the Northwest largely surrendered when the court by its famous decision blasted the legal hopes of the movement for free Territories for white people only. It is believed, as this representative writer goes on to explain, that the *obiter dicta* consist of "personal judgments not needed or relevant for the case in hand, and therefore not law." Being told that the court had rendered judgments not law, and that the judges wilfully had gone out of their way to do so, the attack on the opinion had the desired effect and "inflamed the public wrath immeasurably as a fresh aggression of the slave-power."[1]

Perhaps very few of those who came to believe that the opinion rested upon so rotton a foundation, understood very definitely why or wherein the dictum is said to lie. Some of those who led the assault upon the court differed from each other as to what was the dictum they professed to find, or as to wherein the court had rendered an extra judicial judgment. It will be important, therefore, first to find to what part of

[1] Encyc. Americana, ed. 1903, *Dred Scott Case.*

the court's opinion it is claimed that the *obiter dictum* is said to apply.

To what it cannot apply is essential first to be seen. Sometimes the histories read as if the writers thought the use of references to familiar history by Chief Justice Taney in writing the court's opinion, constitutes *obiter dictum.* However, it must be remembered that scholars and lawyers do not complain that his historical illustrations and references to legal maxims are *dicta.* Writers often misquote or misinterpret the language of the opinion in dealing with these materials; but, as they are of minor importance, no notice will be made here of such abuses. It is important, however, to observe that Taney's method of supporting his conclusions was not new to courts then, and that it is yet an effective and important factor of judicial argumentation. An interesting and recent illustration of this is afforded in the case of Wilson vs. Shaw, decided by the Supreme Court of the United States January 7, 1907. In that case, among other requests, it was asked that the Secretary of the United States Treasury be restrained from paying $40,000,000 to the Panama Canal Company, and $10,000,000 to the Republic of Panama, and from paying out money for the construction of the canal, and from borrowing money for that purpose and issuing bonds of the United States therefor. In deciding the case Mr. Justice Brewer, speaking for the court, said:

"In other words the plaintiff invokes the aid of the courts to stop the government of the United States from carrying into execution its declared purpose of constructing the Panama Canal. The magnitude of the plaintiff's demand is somewhat startling. . . . A company chartered under the laws of France undertook the construction of a canal at Panama. This was done under the supervision and guidance of the famous Ferdinand de Lesseps, to whom the world owes the Suez Canal. To tell the story of all that was done in the construction of this canal, prior to the active intervention of the United

States, would take volumes. It is enough to say that the efforts of De Lesseps failed."[2]

Whether or not the court were startled was not an element or an essential of the court's decision; that De Lesseps "failed" was not required to be decided, and was a question upon which others might hold a different view. Whether the world owes to him the Suez Canal had nothing whatever to do with the court's opinion or judgment. Yet all courts indulge more or less in such statements, and properly; every judicial argument needs its background, its lines of perspective, its shades and shadows, and courts generally paint them. However, there is nothing of the superfluous or irrelevant in the opinion in the Scott case. Such uses of history and illustrations drawn from standard writers do not constitute *obiter dicta;* and they do not in the least impair the court's opinion or judgment.

Waiving a discussion of the question as to when or how far or whether any substantial part of the people may assume to nullify the actual legal force of a decision of the highest court; without discussing whether or not the legislative branch of the government may proceed to re-enact laws based upon an authority declared by the highest court to be beyond the legislature, let us observe in the outset that it will not be authoritatively disputed that *obiter dictum* applies to the *essential decision or decisions upon which the court rests its judgment.* In the opinion of the court in this case these decisions upon which the court, deciding the case as a whole, rested its judgment, which was that the trial court had no jurisdiction, are three: (1) that Scott was not a citizen of Missouri, in the sense in which the word citizen is used in the Constitution of the United States; (2) that Missouri, under the circumstances of the case, properly refused to inquire for or to enforce any extraterritorial law said to have destroyed property rights already vested in Scott, the destruction being contrary to the laws and polity of Missouri; (3) that being within

[2] 204 U. S. 30.

the jurisdiction of the Missouri Compromise anti-slavery law had not established for any of the parties before the court the status and condition of a free person, because the law was contrary to the Constitution and void.

Keep the court proceedings in mind together with the grounds of jurisdiction, and the *kind* of jurisdiction exercised in this case by the Supreme Court of the United States. The importance of a clear distinction will warrant a little repetition. Federal courts, including the jurisdiction of the circuit court in which this case was tried, being limited in jurisdiction in the sense that they have no jurisdiction than that conferred by the Constitution and laws of the United States, require one suing in them to show upon the face of his declaration of complaint or in some affirmative manner by the pleadings the ground upon which he asks the court to exercise jurisdiction. In Robertson vs. Cease the Supreme Court, repeating the settled rule, said that "when the jurisdiction depends upon the citizenship of the parties, such citizenship, or the facts which in legal intendment constitute it, should be distinctly and positively averred in the pleadings, or they should appear affirmatively and in equal distinctness in other parts of the record."[3] In obedience to this requirement Scott, we remember, rested alone upon the ground of diverse citizenship; that is, that he, a citizen of Missouri, was suing Sandford, a citizenship of New York. On the trial Sandford filed what we call a plea in abatement; that is, he said that the suit should stop for want of jurisdiction in the trial court. His reason for saying that the court had no jurisdiction for hearing the case was that Dred Scott "is not a citizen of the State of Missouri as alleged in his declaration, because he is a negro of African descent; his ancestors were of pure African blood, and were brought into this country and sold as negro slaves." To this there was what is known in law as a demurrer; that is, the facts of the plea were admitted while it was denied that their effect was sufficient to destroy jurisdic-

[3] 97 U. S. 646, citing the earlier leading cases.

tion. This plea and the demurrer having been argued, it always being absolutely necessary that the question of jurisdiction of a trial court be first determined, the lower or trial court by judgment sustained the demurrer, holding that it had jurisdiction, whereupon the case was heard upon its merits and as a result of that hearing another judgment entered.

Now notice what the Supreme Court did: It found all these facts in the record. That it had some degree of appellate jurisdiction over the work of the trial court, there is no question; and no one attempted to dispute this appellate power. Opening the record the court found the plea in abatement, the demurrer thereto, and the trial court's judgment thereon—a judgment preliminary to what followed. Now, the question is not, had the Supreme Court appellate jurisdiction? But, it is how far, according to the recognized rules of appellate practice, should the Supreme Court go in its examination of the record; and what questions should it decide or omit? Should it omit any notice of the trial court's judgment of the facts of the plea, and pass into the record and examine the judgment rendered by the trial court on the questions of merit? Or should it examine and decide the questions raised at each stage of the case as it progressed in the trial court? Curtis agreed with the majority that the questions raised by the plea were before the court, and that the preliminay judgment of the trial court thereon should be affirmed or reversed, as might be determined proper. That this was the correct practice is certain. As to the *conclusion* to be reached upon that plea and the judgment of the trial court thereon, the first difference between the majority and the dissenting judges appeared.

The majority held that the judgment of the trial court upon the facts of the plea was erroneous; that the facts therein, admitted by Scott to be true, showed a lack of jurisdiction in the trial court to hear and determine the *merits* of the case, because those facts "disqualified the plaintiff from becoming a citizen, in the sense in which that word is used in

the Constitution of the United States."[4] So, having based his right to sue upon the assertion that he was a citizen of Missouri, and that he sued a citizen of New York, the trial court had erred in trying the case on its merits. The two dissenting judges held that the trial court was correct in deciding that upon the facts of the plea it had jurisdiction, and insisted that only in this view could an examination of the other questions be justified.

Now, aside from whether or not the majority was correct in this conclusion as to the legal weight of the facts set out in the plea, having decided that the trial court had no jurisdiction as shown by those facts, *should the majority have stopped at finding want of jurisdiction in the trial court on a consideration of the plea?* There was yet the judgment on the merits, what should the appellate court have done with it? Should it have reversed that judgment? Should it have affirmed that judgment of the trial court on the merits? Should that judgment have been ignored? That the Supreme Court, in exercising this appellate jurisdiction, must have done something with the judgment of the trial court reached on a hearing of the merits, no one questioned and no lawyer will now question. Having said that the lower court on the facts of the plea had no jurisdiction, the appellate court was obliged to look at the judgment of the trial court on the merits to see whether or not it should be reversed or affirmed. Anyone can understand this. As the California court correctly said, the appellate court "must look into the whole record, and see if there be any errors in the final decree rendered" by the trial court.[5] As a matter of fact it might have appeared on the trial that, entirely *apart from the facts of the plea*, the trial court had jurisdiction. For, *on the trial* the facts of the plea had nothing in the world to do with the matter; that plea was a preliminary step; and, having been passed and the court actually having assumed and exercised jurisdiction, Scott was

[4] 19 Howard, 400.

[5] Still vs. Saunders, 8 Calif. 281.

not bound by any admissions made by his demurrer to that plea. Suppose he had shown by evidence that his ancestors had been *Indians* then the judgment on the plea would not have been relevant, for it related to *negroes of pure African blood.* Suppose that he had shown that at some stage his ancestors, being Indians, had become civilized and had actually become citizens of Missouri? Certainly it would then have appeared upon the facts at the trial that Scott had been born of ancestors who were citizens and that, therefore, the court *had jurisdiction.* Had such facts been shown, the trial court having exercised jurisdiction, does anyone doubt that the Supreme Court, as appellate tribunal, would have sustained the jurisdiction thus exercised by the trial court?

In this case the Supreme Court did no more than *follow the record* to see if there were any facts shown at the trial which rendered Scott a citizen of Missouri; that is, whether upon the whole record there was anything to show whether the lower court had jurisdiction. Looking at the questions of merit that had arisen at the trial the appellate court found that they bore directly upon the jurisdiction of the trial court. Because of this relation of the questions of merit to the jurisdiction of the trial court the Supreme Court justified the decision of them. The court entered all the questions of merit to show that even were the majority mistaken in the view it took of the questions raised by the plea, in no view of the case had the trial court jurisdiction to enter a judgment upon the merits, and that even after hearing the case the lower court should have dismissed it for want of jurisdiction. The judgment of the Supreme Court rests, then, upon two views looking directly at the trial court's jurisdiction.

It is plain to see that had the case been such that the facts at the trial had shown jurisdiction, and had the Supreme Court refused or neglected to have examined that phase of the case, the denunciation that would have followed certainly would have been, *if possible,* even more bitter than it was and is. Had the court stopped at the facts of the plea, the par-

ties thus sent from its bar would have retorted that the court had not the courage to decide all the questions presented by them.

The questions of merit that arose at the trial and which were certified to the Supreme Court, were those growing out of the temporary sojourn in the two places as alleged by Scott. He admitted that he was, before his removals from Missouri, and before being in these two places, "a negro slave the lawful property of the defendant."[6] These removals from Missouri were, as we have seen, first to Illinois and from there to Minnesota, the latter a Territory within the jurisdiction of the Missouri Compromise. Here was an admission made at the trial—that Scott himself was a legal slave at least at one time—quite different from that in the plea, and it was plain that if the facts of being for the times and under the circumstances as admitted in Illinois and in Minnesota had not changed the slave status, then Scott was still a slave; and if a slave admittedly not a *citizen* of Missouri; and not being, therefore, such a citizen as is meant by the Constitution, the Federal trial court upon the ground of diverse citizenship had no jurisdiction of the case.

So the charge that the court uttered *obiter dictum* lies against the judgment upon the effect of the removals. Especially this complaint is lodged against the decision upon the effect of being within the jurisdiction of the Missouri Compromise. The statement of Woodrow Wilson is representative of the position of history when he declares that in pronouncing the Missouri Compromise prohibition unconstitutional "the court left the proper field of the case, and therefore uttered *obiter dicta*."[7]

Let us measure this action of Taney and those who concurred making what he wrote the opinion of the court, with the established, well recognized and long settled rules for deter-

[6] 19 Howard, 397.

[7] History of the American People, vol. 5, 177; James Brice, The American Com., 3rd ed., 1905, vol. 1, 263; Guy C. Lee. The True Hist. Civil War, 127; H. W. Elson, Hist. U. S., vol. 4, 47; Carson, The Hist. Sup. Court U. S., vol. 2, 371.

mining obiter dictum, and which define the limits within which a court may decide a case. From the many cases in which we find the applicable rules I select such as are representative and which announce the settled law.

The old English definition of *obiter dictum* is more rigid than the doctrine in America. Bouvier, an early legal lexicographer, defines the more rigid rule "as an expression of opinion, however deliberate, upon a question, however fully argued, if not essential to the disposition that was made of the case." But this rule, unreasonable and if adhered to often injurious, is not recognized as the doctrine with us. On the contrary, it is well settled in this country that a court may decide any number of questions raised in the case and growing out of the record, having been duly considered, which show reasons for the disposition made of that case. "Besides," as the court in Buchner vs. Chicago, etc., pointed out, "mere *obiter* is not always reprehensible. On the contrary, some of the most sacred cannons of the common law had their origin in the dicta of some wise judge."[8]

In the State of Nevada, etc., vs. Clarke[9] the court says: "*Dictum* is defined to be an opinion expressed by a judge on a point not necessarily arising in the case. The reason assigned for *dicta* not being entitled to weight is that usually they are upon some point not discussed at bar—something to which the attention of the court has not been particularly called—and something on which the judge uttering them may not have reflected a moment before expressing his opinion."

Says a New York Court: "Dicta are opinions of a judge which do not embody the resolution or determination of the court, and are made without argument, or full consideration of the point, are not the professed deliberate determination of the judge himself; *obiter dicta* are such opinions uttered by the way, not upon the point or question pending as if turn-

[8] 60 Wisconsin, 264.

[9] 3 Nev. Rep. 572.

ing aside for the time from the main topic of the case to collateral subjects."[10]

In 1893 Justice McCabe of the supreme court of Indiana, dissenting upon another question, had occasion to lay down the rule thus:

"I concede that a question decided that is not before the court, and not involved in the case, is *obiter dictum* and not binding authority. But when the court decides incidental questions essential to the support of the conclusion reached and happens to decide two such questions when one would have been sufficient to support the conclusion, one of such incidental decisions is as binding a decision, and as authoritative as the other. . . . It cannot be any less so because another reason is given in support of the conclusion reached, because another incidental question is decided as an additional ground on which to rest the conclusion reached."[11]

In 1880 the Supreme Court of the United States stated the rule in similar words: "It cannot be said that a case is not authority on one point because, although that point was properly presented and decided in the regular course of the consideration of the case, something else was found in the end which disposed of the whole matter."[12]

Gathering the rule for the determination of obiter dictum from the decisions of the American courts, the *American and English Encyclopedia of Law*, a work of highest authority, says:

"Where the record presents two or more points, and one of which, if sustained, would determine the case, and the court decides them all, the decision upon any one of the points cannot be regarded as *obiter*. Nor can it be said that a case is not authority on a point because, though that point was properly presented and decided in the regular course of the consideration of the case, another point was found in the end

[10] Rohrback vs. Germania Fire Ins. Co., 62 N. Y. Rep. 58.

[11] 136 Ind. R. 533-4.

[12] 103 U. S. 143.

which disposed of the whole matter. The decision on such a question is as much a part of the judgment of the court as is that on any other of the matters on which the case as a whole depends. The fact that the decision might have been placed upon a different ground existing in the case does not render a question expressly decided by the court a dictum."

Let me give a very clear illustration of this rule:

In Ward vs. Maryland,[13] decided in 1870, Mr. Justice Bradley delivered the following dissenting opinion:

"I concur in the opinion of the court, that the act of the legislature of Maryland, complained of in this case, discriminates in favor of residents and against non-residents of the State, and consequently is a violation of the fourth article of the Constitution of the United States, and therefore, *pro tanto*, void. But I am further of opinion that the act is in violation of the commercial clause of the Constitution, which confers upon Congress the power to regulate commerce among the several States; and it would be so, although it imposed upon residents the same burden for selling goods by sample as is imposed on non-residents. Such a law would effectually prevent the manufacturers of manufacturing States from selling their goods in other States unless they established commercial houses therein, or sold to resident merchants who chose to send them orders. It is, in fact, a duty upon importation from one State to another, under the name of a tax. I therefore dissent from any expression in the opinion of the court which, in any way, implies that such a burden, whether in the shape of a tax or a penalty, if made equally upon residents and non-residents, would be Constitutional."

The two things emphasized in this short and clear dissenting opinion, are, (1) a judge may concur in part and dissent in part, and in so far as he does concur, he helps to a *judicial decision by the court;* (2) any number of questions, raised in the record and argued by counsel and considered by the court, which go to decide the case, or answer the

[13] 12 Wallace, 432.

question upon which the judgment rests, may be passed upon, and become a valid part of the opinion. Here Judge Bradley gives *two decisions*, either one of which disposes of the case before the court. In that case the question was: Is a certain State law prohibited by the Federal Constitution? It is unconstitutional, the court said, because it violates the fourth article of the Constitution. It is unconstitutional says Judge Bradley, because it violates the fourth article of the Constitution; but he is further of opinion that it violates the commercial clause of the Constitution. In the first case the law is void; in the second case it is void; either one disposed of the case. But both questions went to answer the question: Is the law Constitutional? and thus both—although either settled the case—might be and were decided.

In the Dred Scott Case, each question decided in the opinion went to answer the question: Had the circuit court jurisdiction as shown upon the whole record? That is: Is Scott a citizen of Missouri in the sense in which the word citizen is used in the Constitution? And the answer: He is not such a citizen because none of his race descend from American slaves can be citizens—unless the Constitution of the United States be amended; and further, he is not a citizen because, the Missouri Compromise being unconstitutional, having relied upon it to change his admitted slave condition, he is a slave; and *upon the whole* he cannot sue in a Federal Court as a citizen of the United States."

Railroad Companies vs. Schutte was an appeal from a decree rendered by the supreme court of Florida, in a case in which that court had passed upon the merits involving the constitutionality of certain bond issues between the State and the Florida Central Railway Company. The trial court held that the company was authorized to issue the bonds that had been given the State in exchange for its bonds and that thereby a lien had been created on the railway company in favor of *bona fide* holders; but, as there was no proof that there were *bona fide* holders, a fact necessary to the jurisdiction of the

trial court, that for that reason the court had no jurisdiction and dismissed the case for want of jurisdiction. On the review of this action of the trial court by the Supreme Court of the United States it was insisted that the decision of the trial court as to the validity of the bonds and the nature of the lien created thereby, was a obiter dictum, because the validity of the bonds and the nature of the lien that had been created were questions of merit, and the court had dismissed the case for want of jurisdiction shown on another question. Here we have a case directly analogous to that under our consideration. The trial court had decided certain questions of merit, and then upon another ground dismissed the case because it said that it had no jurisdiction to try it. What the Supreme Court said upon this action of the Florida court shows clearly whether or not a court may decide the merits of a case and yet dismiss the case for want of jurisdiction. If a lower court may do so, no one will question that the Supreme Court may exercise the same power. Passing directly upon this action of the trial court said Chief Justice Waite, delivering the unanimous opinion of the Supreme Court of the United States:

"As to the first question, we deem it sufficient to say that the supreme court of Florida has distinctly decided that in the case of this company, as well as the other, the statutory authority was complete. The point was directly made by the pleadings and as directly passed on by the court. Although the bill in the case was finally dismissed because it was not proved that any of the State bonds had been sold, the decision was in no sense dictum. It cannot be said that a case is not authority on one point because, although that point was properly presented and decided in the regular course, something else was found in the end which disposed of the whole matter. Here the precise question was properly presented, fully argued, and elaborately considered in the opinion. The decision on this question was as much a part of the judgment of the

court as was that on any other of the several matters on which the case as a whole depended."[14]

Now if a court may ever decide questions of merit while at the same time it dismisses the case for want of jurisdiction, certainly it may with greater reason do so when those questions of merit themselves show the want of jurisdiction. "Where the record presents two or more points, any one of which, if sustained, would determine the case, and the court decides them all, the decision upon any one of the points cannot be regarded as obiter. . . . The fact that the decision might have been placed upon a different ground existing in the case does not render a question expressly decided by the court a dictum." That is, if the Supreme Court in exercising its appellate jurisdiction decides that the lower court was without jurisdiction, it may decide a thousand questions if presented in the record giving the reason for this judgment. In the record of the Dred Scott Case each question decided in the opinion of the Supreme Court as written by Taney was "directly made by the pleadings and as directly passed on by the court." "The decision on each was as much a part of the judgment of the court as was that on any other of the several matters on which the case as a whole depended." Measured by these recognized and long established rules the decision of each question in the Scott case was in no just sense *obiter dictum.*

In the case of Grace vs. The American Century Insurance Company,[15] decided November 19, 1883, the Supreme Court of the United States decided the questions of merit, notwithstanding they held that the record did *not show jurisdiction in the circuit court.* This case embodies the true American doctrine. It was a case, too, in which jurisdiction depended upon the diverse citizenship of the parties. It came to the Supreme Court by writ of error from a Federal circuit court, just exactly as did the Scott case. Mr. Justice Harlan

[14] Railroad Companies vs. Schutte, 103 U. S., 118, 143. Mr. Justice Field was not present at the argument and did not participate in the decision.

[15] 109 U. S., 278.

delivered the unanimous opinion of the court. After discussing and deciding the merits of the questions raised at the trial, and which did not even bear remotely upon the jurisdiction of the trial court, the Supreme Court said:

"As the judgment must be reversed and a new trial had, we have felt it to be our duty, notwithstanding the record, as presented to us, fails to disclose a case of which the court below could take cognizance, to indicate for the benefit of parties at another trial, the conclusion reached by us on the merits."[16] Then, just as did the opinion in the Scott case, the court proceeded to reverse the judgment of the lower court. There was not a dissent! The Supreme Court did not know whether when after the lower court had set aside its judgment in obedience to the mandate of the appellate court the parties could show jurisdiction. The mandate of the Supreme Court was that the lower court "set aside the judgment and for such further proceedings as may not be inconsistent with this opinion," and *that* opinion decided elaborately, *at the same time passing upon the merits,* that the trial court had no jurisdiction. Hence in effect the trial court was ordered to dismiss the case because of the lack of jurisdiction. This action of the Supreme Court shows conclusively that an appellate court may decide the merits of all the questions which are presented in the records, even when the lower court has no jurisdiction, where it, as in the Scott case, had entered a judgment upon the merits. The Scott case was far stronger for the operation of the rule than is that of Grace vs. American Insurance Company. All the questions involved in the Scott case showed that in no view did the circuit court have jurisdiction.

These established rules justify the action of the majority of the court, but there were other reasons which must have acted even more powerfully upon the judicial mind and which rendered it imperative that the court take the course pursued especially in deciding that the prohibition of the Missouri Com-

[16] 109 U. S. 288.

promise law was unconstitutional. As between Illinois and Missouri the court confirmed the action of the lower court, which had followed the decision of the State court when this case was pending against Emerson's estate, in the decision that, having been a slave in Missouri, having been carried to Illinois and then having been returned to Missouri and having sued in the courts of Missouri, her courts would not enforce any anti-slavery law of Illinois. Such laws were as to Missouri clearly extraterritorial, penal, and in conflict with the laws and polity of the State in which Scott sued. The Supreme Court of the United States had before the Scott case recognized this course as the correct one, and the principle upon which it rests cannot be successfully refuted. Recognizing this basal truth, some sought to defeat the force of the decision in this case upon the Missouri Compromise law, by insisting that the same rule applied as between it and Missouri, that, being extraterritorial and penal, the courts of Missouri need not have enforced it, and that the appellate court went out of its way to pass upon what was unenforceable in Missouri.

The most eminent contemporary writers who championed this argument are John Lowell and Horace Gray. In their *A Legal Review of the Dred Scott Case,* published in June, 1857, they argue: The "decision, so far as the residence in Illinois is concerned, is put distinctly upon the ground that the laws of Illinois could not operate on the plaintiff after his return to Missouri. This decision disposes equally of his residence in the Territory, for his stay in each place was for an equal time, and for similar purposes. The whole case being thus disposed of, the opinion on the Missouri Compromise act was clearly extrajudicial."[17] Of course this contention disregards the settled American rule that " where the record presents two or more points, any one of which, if sustained, would determine the case, and the court decides them all, the decision upon any one of the points cannot be regarded as *obiter.*"

[17] Law Reporter, Boston, June, 1857.

However, were this not true, the question raised by Blair as to the right by *birth* of Scott's older child, places the courts of Missouri in an entirely different attitude toward the Missouri Compromise to what they enjoyed with reference to Illinois. No one questions that the entire Scott family was before the court in the Federal case. Blair both in his brief and in his argument laid great emphasis on this aspect of the case, saying one question for the Supreme Court was "whether the facts stated in the agreed case entitled the plaintiff and his family, or either of them to freedom."[18] He called attention to the fact that the older girl was "born on board the steamboat Gypsie, north of the north line of the State of Missouri and upon the river Mississippi."[19] Therefore, as he went on to state, she was either born within the jurisdiction of Illinois or within that of the Missouri Compromise. Illinois, after the river reaches her northern boundary, extends to the middle of the stream. At that time, then, upon the one side of the middle of the river was the law of the Territory while upon the other was the law of Illinois. At one time Blair said that this girl, Eliza, would be presumed to have been born in the State "if such presumption is, for any reason, more favorable to her freedom than the supposition that she was born in the Territory."[20] However, he did not make any attempt to show that birth in Illinois would be more favorable to her freedom, but insisted most strongly that the peculiar facts before the court rendered it imperative that the validity of the Missouri Compromise should be determined. In this he was correct, for there is absolutely nothing to favor the one presumption or the other as to the place of her birth. Counsel, the court and the dissenting judges all agreed that the few facts that were shown concerning the place of her birth presented the inquiry for the laws under which she was born, and of course the validity of the Missouri Compromise.

[18] Blair's Brief, S. C. Clerk's Office, 2.

[19] 19 Howard, 431.

[20] Brief, 16

In either possible place of her birth, was there a valid anti-slavery law in force at the time?

At the time of the decision of this case as well as at the time the suit was brought Minnesota, in which Fort Snelling is located, was yet a Federal Territory. It so remained until 1858. This girl could have sued directly in its courts, and had she done so the validity of the Missouri Compromise must have been determined. She was a party before the court with a right of future action. In such action the validity of the law that had been most fully argued in this case must have been decided by the trial court, and from that decision there lay an appeal to the Supreme Court of the United States. She had a right of action independent of the citizenship of her father. Of course the court did not know that she would ever prosecute this action, neither did the court know that the parties would prosecute a "future" action in the case of Grace vs. American Insurance Company. But courts act upon the presumption that parties will use every right to which they are entitled, and in as far as possible the prevention of litigation when no advantage could accrue in a future action is an established rule of appellate review. So just as did the unanimous court in this recent case the court in the Scott case held: "As the judgment must be reversed and a new trial had, we have felt it to be our duty, notwithstanding the record, as presented to us, fails to disclose a case of which the court below could take cognizance, to indicate for the benefit of parties at another trial, the conclusions reached by us on the merits." And the more properly so, because, as the court said of the questions decided in Railroad Companies vs. Schutte, so in the Dred Scott Case the Missouri Compromise was properly presented, fully argued, and elaborately considered; and again the more so because the dicision as to prohibitative measure was to give another reason for holding that the trial court had no jurisdiction. *A fortiori,* to yet follow the language of the court in the Florida case: "The decision on this question was as much a part of the judgment of the court

as was that on any other of the several matters on which the case as a whole depended."

Yet this is not all. Aside from any right of the girl to sue in a Federal court, apart from any probability that she would thus sue, the Missouri Compromise law was before the Supreme Court in the action actually under review. That we may more clearly see this, let me again call attention to the *kinds* of court jurisdiction. There is, as has been said, an important distinction between the original jurisdiction of the Supreme Court and its appellate jurisdiction. Those who complain of the judgment upon the act of Congress purporting to prohibit slavery in the Territory, overlook this distinction and its applicability to the facts of this case. If the Supreme Court had been trying a case which had been commenced in it, and had been sitting as a trial court, it might have omitted some of the questions decided. When the record in a case reaches the Supreme Court, having been appealed from a lower court, generally brought up on writ of error as it is called in the language of the law, its first concern is as to whether it has *appellate* jurisdiction over that case. Even then it must look at the questions presented in the record, and from the record determine: unless it be plain that there is no appellate jurisdiction, in which case no writ of error issues to the lower court. For instance, of the many cases that might be cited, in Menard vs. Aspasia, in which Judge McLean wrote the opinion in 1831, it was determined that the Supreme Court had no jurisdiction to entertain the appeal from the judgment of the trial court.[21] The court decided all the questions which showed that it had no appellate jurisdiction; but, except in so far as they bore upon the question of the appellate jurisdiction of the Supreme Court, the court did not decide the questions of merit. But in the Dred Scott Case no one questioned the right and power of the Supreme Court to exercise appellate jurisdiction.

[21] 5 Peters, 505.

Now, the Supreme Court not only had appellate jurisdiction over the proceedings and judgment in the trial court, but it had appellate jurisdiction over *this same case that was pending in the State court,* and which had been continued to await the decision of the *Supreme Court* in the action brought in the Federal circuit court. Of this fact the court was specifically informed by the record. In the State action there was no question of citizenship involved, and the State trial court's jurisdiction was not disputed. From the final decision of the highest court of Missouri in that action there lay an appeal to the Supreme Court of the United States on the ground that there was drawn in question the validity of an act of Congress: *the Missouri Compromise.*

This act of Congress was involved in the State action because of the question of its effect upon Scott and his wife; and in a more important sense because of the question as to its effect upon the rights of the older girl by reason of her *birth* within *that law's* jurisdiction. This was as true of any future action that the girl had a right to bring in the *State court of Missouri* as it was of the pending action. Blair argued: "The freedom of Harriet and her daughter Lizzie depends on the validity of the eighth section of the Missouri Compromise"—the section prohibiting slavery. Then he urged: "The validity of this section is denied, on the ground that Congress possesses no power to prohibit slavery in the Territories. This is a question of more importance, perhaps, than any which was ever submitted to this court; and the decision of the court is looked for with a degree of interest by the country which seldom attends its proceedings. . . . It is in form here a question on the construction of a few words in our fundamental law."[22] Then reaching out for every available foothold in favor of the girl he urged upon the court the necessity of deciding the validity of that law because, if it were valid as he insisted, the girl was *born free.* He called the attention of the court to the decisions of the Southern States

[22] Blair's Argument, 26.

upon this point, among them that it was "decided by the court of appeals of Virginia, in the case of Spotts vs. Gillespie,[23] that a child born in the State of Pennsylvania after the act of 1780 abolishing slavery, was free, although born of a slave mother, and was free in Virginia as well as in Pennsylvania." And a yet stronger case to which he pointed was the decision that a child born of a fugitive slave within the limits of an anti-slavery law, was born free. That is, the law within the actual jurisdiction of which a child was born, determined its status.

This was, too, the settled and undisputed law of Missouri. It had long before this case been determined by the highest court of Missouri that a child, though of a slave mother, born within the jurisdiction of a valid anti-slavery law was born free.[24]

That Blair was right in this position no one questioned. It was the universal law in this country that the law in force at the place and time of birth, the parents being negroes of African descent and legal slaves themselves, determined whether or not the property rights of the owner of the mother should *attach to the child*. Being a negro of African descent, the presumption, of course, was that the girl was born a slave; but she sought to destroy the presumption, just what Scott did not attempt to do as to that raised by the plea in abatement, by taking refuge under the prohibitive act of Congress. This as to her was ample were it valid and in force. As between the State of Missouri and the Territory, just as between the two States, as to Scott the question was whether or not the property right that had attached under the Missouri law would be recognized as destroyed by an extraterritorial law; but as between Missouri and the girl the question was as to whether the property right as to her attached at *birth*. It was by birth only after 1808 that a negro could become slave property in

[23] 6 Randolph, 572.

[24] Merry vs. Tiffin, 1 Mo. 725; Theoteste vs. Chouteau, 2 Mo. 144; Menard vs. Aspasia, 5 Peters, 503. This latter, decided by the Supreme Court of the United States in 1831, being an appeal from the Missouri court upon this question sustains the State.

the United States; and after that date that property right had its origin by birth within the geographical limits of some law which either created or fostered and preserved slave property and the source of its origin. The distinction lay between whether or not property rights had vested and whether or not they could vest. If there was a law prohibiting the attachment of slave property rights, in this country it was held to take effect as to those *born after its enactment*. Upon this principle slavery was *gradually* driven from all the Northern States. Their anti-slavery laws did not destroy *vested* property interests, even when not specifically so stated, existing as to slaves that were slaves at the enactment of the laws. Those who claim the validity of the anti-slavery provision in the Ordinance of 1787 admit that as to the slaves within its jurisdiction at its enactment no rights were changed. Congress recognized this principle when it bought and liberated the slave property in the District of Columbia. Such was the law in America up to the unwarranted and vindictive attempt of President Lincoln to emancipate slave property,—an attempt which succeeded because of the helpless condition of the States affected and because acquiescence was the cheapest price for what exhausted strength could not achieve.

Hence, involving the validity of the Missouri Compromise there was not only a right of a future action subject to appeal to the Supreme Court of the United States, but the appeal actually before the court was in effect an appeal from both the Federal circuit court and the State court,—for the State court suspended its action to await the determination of the questions by the Supreme Court. Therefore it is not correct to say that the decision as to the effect of the stay in Illinois disposes equally of the questions as to the Territory. The most potent question as to the girl's birth had no connection with or relevancy whatever to the stay of her father in Illinois. Taney and the court saw this, and because of the fact that as between Missouri and Illinois the question depended entirely upon the willingness of Missouri to enforce

the penal laws of Illinois (if as against slavery there had been any), the Illinois laws were not examined. The court went not one step beyond what was necessary to determine the rights, in the view that it took of the law, of all the parties to the case before it. The court might have shrunk from the grave duty which the decision of the Missouri Compromise imposed; but to have thus shirked would have been to have omitted not alone what was proper to be done but to have spurned the insistent prayers of those who bore that question to the bar of the court, and who incorporated it in every possible phase in the *record* made by collusion between scheming Republicans for no other purpose than to have *it decided by that highest tribunal.* Thus raised by the record, carefully argued by counsel, examined by the mind of the court, the legality and validity of the Missouri Compromise, the power of Congress either to *destroy or prevent* slave property in a Territory, in the words of the court in Kane vs. McCowan, "though its decision might have been avoided, the opion was not therefore an *obiter dictum.* It frequently happens that a single point in a case will determine the affirmance or reversal of a judgment in that case, but it does not follow that the court may not proceed to examine and decide other points which the record presents; and indeed the latter course is most satisfactory to all parties concerned, and saves the necessity of again resorting to another trial."[25]

These rules for determining *obiter dictum* lay down the settled doctrine in America. In fact, the rules as announced by these leading cases are not authoritatively questioned. Summing them up Taylor says:

"When the Supreme Court has decided against the jurisdiction of the circuit court on a plea in abatement, it has still the right to examine any question presented by exception [and it was by exception, as the language of the law expresses it, that the Missouri Compromise was presented], and may re-

[25] 55 Mo. 181, 189.

verse the judgment for error committed, and remand the case to the circuit court for it to dismiss for want of jurisdiction."[26]

This was what the opinion as written by Taney and as concurred in by the majority did, the conclusion being:

"Upon the whole, therefore, it is the judgment of this court, that it appears by the record before us that the plaintiff in error is not a citizen of Missouri, in the sense in which that word is used in the Constitution; and that the circuit court of the United States, for that reason, had no jurisdiction in the case, and could give no judgment in it. Its judgment for the defendant must, consequently, be reversed, and a mandate issued directing the suit to be dismissed for want of jurisdiction."[27]

It is interesting to remember in connection with the fact that Scott was sent from the Federal court because he was held not to be a citizen, in the sense in which that word is used in the Constitution, that as early as 1816 our Supreme Court decided that one who was a citizen of a Territory could not sue in a Federal court as a *citizen* as the word is used in the same clause of the Constitution upon which Scott's attorney relied. The same court has decided that a "citizen of the District of Columbia could not maintain a suit in the circuit court of the United States," on the ground of citizenship as provided in the jurisdiction clause of the Constitution.[27] These decisions rest upon the fact that neither the District of Columbia nor a Territory is a State in the sense in which that word is used in the Constitution. So that we see that the court did not apply to Scott any peculiar or discriminating rule, or use any method of construction and interpretation that had not been and that was not yet actually applied to all persons, white or black, invoking the jurisdiction of Federal courts. Neither did the decision deny to negroes the Federal

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[26] Jurisdic. and Procedure of the Supreme Court U. S. (1905), 651.

[27] 19 Howard, 454.
An instance of an *obiter dictum* is in DeLima vs. Bidwell, 152 U. S. 1, one of the famous insular cases. See U. S. vs. Heinszen, &c., 206 U. S. 370.

[28] 1 Wheat. 93; Curtis (the judge who dissented in the Scott case), Jurid. of U. S. Courts, 2nd ed., 138; Hepburn vs. Ellzy, 2 Cranch, 445.

courts, as I have before said. Any slave had the right to sue for his freedom in the courts of any State, and the courts, especially of the Southern States, not only heard his complaint, but afforded him protection and opportunity for the hearing. In all cases where a "final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where there is drawn in question the validity of a treaty or statute of, or any authority exercised under, the *United States*, and the decision is against their validity; or where there is drawn in question the validity of a statute of, or an authority exercised under a State, on the ground of their being repugnant to the Constitution, treaties, or laws of the *United States*, and the decision is in favor of their validity; or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the *United States*, and the decision is against the title, right, privilege, or immunity specially set up or claimed by either party, under such Constitution, treaty, statute, commission or authority," an appeal lies to the Supreme Court of the United States, which as an appellate court has the power to re-examine and reverse or affirm.[29] From the earliest days down to the Dred Scott decision this was true; and often suits in State courts by negro slaves seeking freedom were appealed to the Supreme Court of the United States, and there finally determined, as can be seen by inspecting the reports.

Naturally one asks why, in this view of the Dred Scott decision, the now prevalent error has so long remained. Possibly one explanation lies in the fact that writers and teachers have too long largely accepted what was said of the opinion while yet the sting of defeat warped the judgment. However, Woodrow Wilson, with no reference to this case, once uttered a truth timely and applicable. He said: "We write nowadays a great deal with our eyes circumspectly upon the tastes of our neighbors, but very little with our attention bent

[29] 27 Am. Eng. Enc. Law, 640; Desty's Fed. Proced. 766; and any standard legal work upon this subject.

upon our own natural selfspeaking thoughts and the very truth of the matter whereof we are discoursing." Too, a yet no-less unpardonable cause for historic untruth is that "the truth of history is a very complex and a very occult matter. . . . The thing is infinitely difficult. . . . So historians take another way, which is easier: they tell part of the truth,—and obtain readers to their liking among those of similar tastes and talents to their own."[30]

[30] Mere Literature and Other Essays, 54, 162.

VII.

CONGRESS AND TERRITORIAL LEGISLATION.

Some acts of government are not subject to review or question by our courts. Such acts are called political, and belong absolutely and exclusively to the legislative and executive branches of our government; and in reference to such powers these branches are also called *political.* It was contended by some that such questions as the control of domestic slavery in a Territory belonged exclusively to the political department of the Federal Government; and that, therefore, the courts could not review such legislation. Others insisted that the courts had jurisdiction to review to find if any specific prohibition of the Constitution had been violated, contending that Congress had plenary power to enact for the people of a Territory any law it deemed needful so that it be not an *ex post facto* law or bill of attainder, or law impairing the obligation of contracts;[1] or in disregard of any express prohibition contained in the Constitution.[2] All agreed that the anti-slavery provisions of the Missouri Compromise measure certainly did not come under any one of these "express prohibitions on Congress not to do certain things" contained in the Constitution. Hence arose the questions: Do the provisions of the Constitution apply to Congress in legislating for a Territory? If so, what is the measure of power when legislating over persons and property? Or, in legislating for a Territory a part of the United States, does the sovereignty of the Federal Government recognize in any respect the limitations im-

[1] Art. 1, secs. 9 & 10, Const.

[2] See Judge Curtis' argument, 19 Howard, 614.

posed upon Congress by the Constitution? That is, were such measures as the Missouri Compromise within legislative power, and if within legislative power, were they political?

Judges Curtis and McLean, the two dissenting judges, took a ground in part in common with the majority, and held that the Constitution was operative upon Congress in such cases, but that the terms of that instrument conferred upon Congress plenary authority. Others of influence in the councils of the nation, and who were not on the bench, took the ground that in legislating for territory such as was the Louisiana Purchase at the time of the Missouri Compromise, Congress exercised the legislative functions of the untrammeled sovereignty of a nation, and therefore rested under none of the restraints of the Constitution.

The majority of the court, in the words of Chief Justice Taney upon this question held and decided:

"The power to acquire [territory] necessarily carries with it the power to preserve and apply to the purposes for which it was acquired. The *form* of government to be established necessarily rested in the discretion of Congress.[3] . . . But the power of Congress over the person or property of a citizen can never be a mere discretionary power under our Constitution and form of government. The powers of the government and the rights and the privileges of the citizens are regulated and plainly defined by the Constitution itself. And when the Territory becomes a part of the United States, the Federal Government enters into possession in the character impressed upon it by those who created it. It enters upon it with its powers over the citizen strictly defined, and limited by the Constitution, from which it derives its own existence, and by virtue of which alone it continues to exist and act as a government and sovereignty. It has no power of any kind beyond it; and it cannot, when it enters a Territory of the United States, put

[3] The younger student must not permit confusion between the *form* of government and the power over persons who are to be governed and whatever rights they have. The form simply means the machinery by which the laws shall be administered; as, for instance, by a governor appointed by the President and a commission of other officers appointed by Congress.

off its character, and assume discretionary or despotic powers which the Constitution has denied to it. . . . The Territory being a part of the United States, the government and citizen both enter it under the authority of the Constitution, with their respective rights defined and marked out; and the Federal Government can exercise no power over his person or property, beyond what that instrument confers, nor lawfully deny any right which it has reserved."[4]

If this doctrine, that the Constitution controlled Congress in legislating for a Territory, should be accepted Webster and Benton had taught in vain. Such men do not die easily, so Benton marshalled the old forces around the now perishing doctrine and struggled desperately. Benton was Missouri's distinguished Senator for a number of years, an anti-slavery Democrat, but opposed to abolition methods in vogue in the North and Northwest. Largely because a Democrat Benton's influence has done much to keep history in error regarding the political nature of the Missouri Compromise law, and as to the source of the power and right of Congress to legislate for Territories.

Benton's arguments are published in his "Legal and Historical Examination of the Dred Scott Case," which came from the press in 1857.[5] In common with the arguments made earlier by Webster he insisted that Congress should govern the Territories independently of the Constitution. He would have the Constitution in its limitations on Congress confined to the geographical boundaries of the States. His fundamental premise was that the "fundamental" error of the court, "father to all political errors," was the proposition that "the Constitution extends to the Territories."[6] Not only in his debate in Congress with Calhoun, but in the courts Webster clung to his theory. In the case of American Insurance Company vs. Canter,[7] involving the relation of Florida as a

[4] 19 Howard, 449, 450.

[5] Extracts from Benton's work are given in volume four of Hart's History as Told by Contemporaries, p. 123. The complete work may be found in large libraries.

[6] Benton's Examination, 31.

Territory to the United States, Webster argued before the Supreme Court of the United States that "Florida was to be governed by Congress as she thought proper" regardless of any power conferred or withheld by the Constitution.

However, the doctrine of Calhoun had won its way even into the ranks of the Republican party. Rejecting the teaching of Webster and Benton, of those actively engaged in this case, eminent representatives of their parties, we find Curtis and McLean of the United States Supreme Court, Blair of counsel for Scott, and G. T. Curtis, Mr. Justice Curtis' brother. Shoulder to shoulder with them were now the Republicans. They had gone into the court in this case standing upon the position that Congress could not terminate property rights adhering in slaves or any other objects of property—unless the Constitution gave Congress that power. They differed from the Chief Justice and the majority merely upon the *construction* of the Constitution.

Mr. Justice Curtis' argument is regarded by some historians as most conclusive, and his views are yet widely accepted. Certainly they are representative. His position was this:

"Congress possesses the power of governing" territory "acquired either by conquest or treaty," "when acquired, not by resorting to supposititious powers, nowhere found described in the Constitution, but expressly granted in the authority to make all needful rules and regulations respecting the territory of the United States. . . . I construe this clause, therefore, as if it had read, Congress shall have power to make all needful rules and regulations respecting those tracts of country, out of the limits of the several States, which the United States have acquired or may hereafter acquire . . . this is a grant of power to Congress—it is therefore necessarily a grant of power to legislate. . . . What are the limits of that power? To this I answer, that, in common with all other legislative powers of Congress, it finds its limits in the express prohibitions on Congress not to do certain things; that, in the exer-

[7] 1 Peters, 538.

cise of the legislative power, Congress cannot pass an ex post facto law or bill of attainder; and so in respect to each of the other prohibitions contained in the Constitution.

"Besides this, the rules and regulations must be needful. But undoubtedly the question whether a particular rule or regulation be needful must be finally determined by Congress itself. Whether a law be needful, is a legislative or political, not a judicial, question. Whatever Congress deems needful is so, under the grant of power. . . .

" . . I cannot doubt that this is power to govern the inhabitants of the territory, by such laws as Congress deems needful, until they obtain admission as States. . . .

"It will not be questioned that, when the Constitution of the United States was framed and adopted, the allowance and prohibition of negro slavery were recognized subjects of municipal legislation: every State had in some measure acted thereon; . . . The purpose and object of the clause empowering Congress to make all needful rules and regulations respecting territory being to enable Congress to provide a body of municipal law for the government of the settlers, the allowance or prohibition of slavery comes within the known and recognized scope of that purpose and object."[8]

In this argument of Curtis we have the antithesis of the position taken by the Chief Justice with whom the majority of the court agreed, in construing the words of the Constitution. How do the two positions stand as measured by rules determined by recent and settled constructions? Too, what has become of the theory of Webster and the teaching of Benton?

Questions identical in principle to that which the constitutionality of the Missouri Compromise presented have arisen concerning other Territories; and questions not less difficult and important come to us from Alaska, Porto Rico, and the more distant Philippines. Fortunately for the students of ante-bellum history no change in our Constitution has altered the principles or the provisions by which Congres-

[8] 19 Howard, 614-15-16.

sional power in such cases is to be measured. From the many cases I shall quote representative ones; so that the now settled doctrine may be seen, at least as to Territory such as was that affected by the Missouri Compromise.

As early as 1850 the power of Congress to enact law for a Territory was considered by the Supreme Court of the United States in Webster vs. Reid.[9] The case turned upon the validity of a statute of the Territory of Iowa, which provided for trial without a jury and by the judge of a certain class of actions at law, growing out of contests over property rights. Judge McLean, who dissented in the Scott case, delivered the opinion of the court. The court held that the seventh amendment of the Constitution, preserving the right of trial by jury in certain suits, was applicable to the Territories, and binding upon Congress in providing the organic law under which the territorial legislature acted, and that the act in question, being in violation of the amendment, was void.

From that day on down to the present the principles upon which the Dred Scott decision rests have more and more been recognized as the distinctive features of our Government. The Supreme Court of the United States in Reynolds vs. the United States, in 1878,[10] treated the sixth amendment of the Constitution as applicable to Congress in legislating for the Territory of Utah; and a similar application was made in Springville vs. Thomas, 1896,[11] and in the American Publishing Company vs. Fisher.[12] In Thompson vs. Utah, decided the same year,[13] Judge Harlan, speaking for the court, pointed out that it was then "no longer an open question" that the provisions of the "National Constitution relating to the rights of trial by jury in suits at common law" and "to trial by jury for crimes and for criminal prosecutions," applied to the Territories of the United States.

[9] 11 Howard, 437.

[10] 98 U. S. 145.

[11] 166 U. S. 707.

[12] Ib. 464.

[13] 170 U. S. 343.

The seventh amendment preserves the right of trial by jury in certain civil actions. There is no express provision in this article that "trial by jury" shall mean the unanimity of the common law rule, but in Springville vs. Thomas, where "it was contended that the Territorial legislature of Utah was empowered by Congress, in the organic act of the Territory, to dispense with unanimity of jurors in rendering a verdict in criminal cases," the court said: "In our opinion the seventh amendment secured unanimity in finding a verdict as an essential feature of trial by jury in common law cases and the act of Congress could not impart the power to change the Constitutional rule, and could not be treated as attempting to do so."

In the case of the Monongahela Navigation Co. vs. the United States, the court said: "But like other powers granted to Congress by the Constitution the power to regulate commerce is subject to all the limitations imposed by that instrument, and among them is that of the fifth amendment." Then proceeding to construe the latter clause of that amendment the court continued: If "Congress. . . . deem it necessary to take private property, then it must proceed subject to the limitations imposed by the fifth amendment, and can take only on payment of just compensation." Quoting this in 1892, Justice Brewer said: "And if that be true of the powers expressly granted, it must as certainly be true of those that are only granted by implication."[14]

Still further the court repeats the settled rule in the case of the Monongahela Navigation Company vs. the United States:

"The language used in the fifth amendment in respect to this matter is happily chosen. The entire amendment is a series of negations, denials, of right or power in the Government. . . .

"Congress seems to have assumed the right to determine what shall be the measure of compensation. But this is ju-

[14] 149 U. S. 736.

dicial, not a legislative question. The legislature may determine what private property is needed for public purposes—that is a question of a political and legislative character; but when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public taking the property, through Congress or the legislature, its representatives, to say what compensation shall be paid, or even what shall be the rule of compensation. The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry.[15]

That the protections of the Constitution over property, as thus so long settled with us, apply to property in Territory, there can be no question. In Yick Wo vs. Hophins[16] Mr. Justice Field reiterated the rule long recognized when he observed that the provisions of the fourteenth amendment to secure life, liberty, and property "are universal in their application to all persons within the Territorial jurisdiction;" and, confirming this, Mr. Justice Shiras, in Wong Wing vs. the United States,[17] said: "Applying this reasoning to the fifth and sixth amendments, it must be concluded that all persons within the territory of the United States are entitled to the protection guaranteed by those amendments."

When cases growing out of our insular possession began to come up for decision, some differences between opinions of members of the court developed. In Downs vs. Bidwell and DeLima vs. Bidwell[18] it was decided that the plaintiff therein was not entitled to recover the amount of duties he had paid under protest upon importation into the city of New York of oranges from San Juan, Porto Rico, in November, 1900, after the passage of the Foraker act. But there was no concurrence of a majority of the court as to the grounds of the judgment. A difference developed among members of the court as to whether Congress in legislating for territory not

[15] 148 U. S. 327.

[16] 118 U. S. 300.

[17] 163 U. S. 228.

[18] 182 U. S. 244.

made a part of the United States was under all the restrictions of the Constitution applicable when legislating for territory theretofore incorporated into the United States.

Following this judgment, without a decision as to its grounds, came Hawaii vs. Mankichi[19] in which the right to jury trial in outlying territory of the United States was the main question. The court *decided,* over the protest of some of the judges, that the provisions of the Federal Constitution as to grand and petit juries relate to mere method of procedure and are not fundamental in their nature, and therefore that as to such matters of method in legislating for such territory not yet a part of the United States, Congress was not under all the restraints and limitations of the Constitution which would be binding when legislating for territory a part of the United States, and so that Congress might provide for jury trial other than that preserved by the Constitution, when legislating for outlying and unannexed country. Judge Harlan's dissent in this case is especially valuable for his defence of the applicability of those fundamental rights under all conditions of territory.

In Dorr vs. the United States,[20] decided May, 1904, the question "whether in the absence of a statute expressly conferring the right, trial by jury is a necessary incident to judicial procedure in the Philippine Islands, where demand for trial by that method has been made by the accused and denied by the courts established in the islands," the court in its decision said: "It may be regarded as settled that the Constitution of the United States is the only source of power authorizing action by any branch of the Federal Government. 'The government of the United States was born of the Constitution, and all powers which it enjoys or may exercise must be either derived expressly or by implication from that instrument.'" Then the court pointed out that the islands at the time of the suit were not incorporated into the United States,[21] and held

[19] 190 U. S. 197.

[20] 195 U. S., 153.

[21] Ib. 143.

that the Constitution does not require Congress to enact for ceded territory, not made a part of the United States by the political department of the Government, a system of laws which shall include the right of trial by jury.[22]

However, as to territory incorporated into the United States, the principles have remained clear and undisturbed.

A representative case comes from the Territory of Alaska. Article three of the treaty concerning Alaska[23] has been held by the Supreme Court to have incorporated that Territory into and to have made it a part of the United States, just as was the Louisiana Territory a part of the United States at the time of the enactment of the Missouri Compromise. In enacting a code for Alaska Congress[24] provided: "That hereafter in trials for misdemeanors six persons shall constitute a legal jury."

Now, just as in the other cases, there was a rule for a Territory, and one which Congress deemed needful. It was one which did not come, most clearly, within the express prohibitions of the Constitution to which alone Mr. Justice Curtis insisted Congress must look for what it could *not* do. This Alaskan law was one which met every condition that he laid down. It was not "within the express prohibitions on Congress not to do certain things;"[25] it was a municipal regulation made for the government of territory outside of the original States or of any State. It was a rule or regulation which Congress had determined to be "needful." It was for a Territory a part of the United States. It was a personal regulation, a law for the government of persons and the determination of their rights. It gave rise to a case parallel with the Dred Scott Case upon the constitutionality of the Missouri Compromise. Having gone there from a local court in the regular way, this case involving the Alaska law reached the Supreme Court of the United States, and on April 10, 1905,

[22] Ib. 153.

[23] 15 Stats. at Large, 542.

[24] 31 Stats. at Large, 358, ch. 786.

[25] 19 Howard 614.

Mr. Justice White delivered the opinion of the court therein. The question at issue was whether Congress had the power to provide such a law for a Territory. It was alleged that no such power rested in Congress either upon the ground of supreme national sovereignty, under the "rules and regulations" clause[26] relied upon by Curtis, or on any ground whatever, and that particularly the law was in violation of the sixth amendment of the Constitution. This amendment says: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State or district wherein the crime shall have been committed, which district shall have been previously ascertained by law," etc. Whether it shall be a jury of six, seven (as we have in many States under State law) or twelve the Constitution does not expressly say.

"As it conclusively results from the foregoing considerations that the sixth amendment to the Constitution was applicable to Alaska, and as of course, being applicable, it was controlling upon Congress in legislating for Alaska, it follows that the provision of the act of Congress under consideration, depriving persons accused of misdemeanors in Alaska of a right to trial by common law jury [of twelve men], was repugnant to the Constitution and void," the court decided.[27]

That this territorial law which Congress had assumed to enact and which it declared needful was *void,* because *unconstitutional,* was the unanimous decision of the full court. The restraints of the Constitution are not only, therefore, applicable, but that instrument is to be now applied as meant when adopted or amended. At the time of the adoption and the amendment it was understood that a jury meant twelve men. So of all the powers or limitation of Congress; in the meaning in which they were incorporated are they enforced until changed by the people.

Therefore, as can readily be seen, it is now the settled

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[26] Art. IV., sec. 3, par. 2.

[27] Fred Rasmussen vs. the U. S., 25 S. C. Rept. 514, 518, 197 U. S. 518.

doctrine in America that in legislating for a Territory, most certainly when it is a part of the United States as was the Louisiana Purchase when the Missouri Compromise was enacted, both the express prohibitions and "those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments," are binding upon Congress.[28] As Judge McLean even when dissenting admitted: "No powers can be exercised which are prohibited by the Constitution or which are contrary to its spirit."[29] There can, in the face of the admitted constitutional law and practice of to-day, be no question that Taney was right in contending that the Constitution must govern and that in its provisions alone could Congress find authority for legislating for the Louisiana Territory. There was no "unwritten Constitution" to which Congress could appeal; there was no "higher law." Webster and Benton were wrong, and any reasoning with their position as a premise will lead to error. Curtis' great premise, "whatsoever rules Congress deems needful are needful," was a great blunder. From the latest session of our Supreme Court, from our famous insular cases back to the Dred Scott Case, legislation by Congress for a Territory has often been pronounced unconstitutional, and suppressed by the court.

Curtis made another fatal blunder, and now and then other judges before and since him seem to have fallen into the same pit. Curtis argued that Congress might do concerning any subject in a Territory what a State within its jurisdiction might do by legislation over the same subject. Here and there through the decisions upon Congressional power are *dicta* to the same effect. In the American Insurance Company vs. Canter[30] Chief Justice Marshall seems to have said that acquired territory is subject to absolute control by Con-

[28] In Downs vs. Bidwell, 182 U. S. 237, Mr. Justice White gives an elaborate history of the way in which the Louisiana Purchase became a part of the United States. On territorial power see also Mormon Church Case, 136 U. S. 1; Burns vs. U. S., (1904) 194 U. S. 491; Callan vs. Wilson, (1888) 127 U. S. 550; Reynolds vs. U. S., (1878) 98 U. S. 145; Laschi vs. Territory, (1857) 1 Wash. Ter. 13.

[29] 19 Howard, 542.

[30] 1 Peters, 541.

gress "on such terms as the new master shall impose;" and in the Mormon Church case,[31] Judge Bradley declared: "The power of Congress over the Territories of the United States is general and plenary, arising from and incidental to the right to acquire the territory itself, and from the powers given by the Constitution to make all needful rules and regulations respecting the territory or other property belonging to the United States." And in a comparatively recent case involving the validity of a divorce, the language of the court in deciding another divorce case, Barber vs. Barber,[32] is quoted with apparent approbation: "Having entire dominion and sovereignty over Territories Congress has full legislative power over all subjects upon which the legislature of the State might legislate within the State; and may, at its discretion, entrust that power to the legislative assembly of a Territory."[33]

But, as we have seen, such statements as these are now indisputably overruled by the settled doctrine as we have seen it announced in the leading and representative decisions. The error of the apparent view here and there thus interjected into the cases and as expressed by Mr. Justice Curtis is also undeniably seen when we remember that it is universally admitted that several of the restrictions of the Constitution, among them being those of the fifth amendment upon which Chief Justice Taney and the majority relied, are not prohibitions on State action, but are limitations exclusively on the power of Congress. For instance, at the time of the Dred Scott Case and before the fourteenth amendment which became operative in 1868, what was not "due process of law" for Congress was not necessarily so for a State.[34] So following the admitted rule and applying to Congress the limitations of the Constitution in legislating for a Territory, it is seen that what would not have been due process of law in destroying vested rights

[31] 136 U. S. 42.

[32] 21 Howard, 582.

[33] 201 U. S. 308, citing Cope vs. Cope, 137 U. S. 686. To the same effect is Simms vs. Simms (1899), 175 U. S. 162, 168, also a divorce case, citing Shively vs. Bowlby, 152 U. S. 26, and cases cited, and Utter vs. Franklin, 172 U. S. 423.

[34] See chapter, "Due Process of Law."

in slave property in a Territory, would have been due process of law, so far as the Constitution was concerned, in a State, for the very simple reason that that provision of the Constitution was not then a prohibition upon the State and was a limitation exclusively upon Congress.

Then, the Constitution of the United States being applicable and the sole guide, what did that great charter say as to the power of Congress over property in a Territory: specifically, in the Louisiana Territory and over slave property? What was the letter and "spirit" of the Constitution concerning slave property? How should Taney have interpreted the Constitution in determining the power of Congress over slave property in a Territory? Should he have construed it as he perhaps felt it ought to have been, or as moralists felt it ought to have been, or as its FRAMERS MEANT IT TO BE AT ITS CREATION.

Taney and with him the court, applying to Congress the limitations of the Constitution, gave that great charter the force which they believed its framers intended and which it was meant to have when adopted by the people of the several States. In that method he has been steadily followed, as was shown in chapter one, as he followed the earlier precedents. One of the later of these instances is found in the case of South Carolina vs. the United States, decided on December 4, 1905. Mr. Justice Brewer, delivering the opinion of the court in that case and speaking for the court says: "The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted it means now . . . as said by Mr. Chief Justice Taney in Dred Scott vs. Sanford, 19 Howard 393, 426:

"'It is not only the same in words, but the same in meaning, and delegates the same powers to the government, and reserves and secures the same rights and privileges to the citizens; and as long as it continues to exist in its present form, it speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from

the hands of its framers, and was voted on and adopted by the people of the United States. Any other rule of construction would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passion of the day.'"[35]

With this rule in mind, a rule often approved by all departments of our governments, let us follow briefly the reasoning of the court as Taney applies the Constitution to Congress in determining its power to legislate over rights of slave property in a Territory. Says the Chief Justice speaking for the court upon this point:

"The principle upon which our governments rest, and upon which alone they continue to exist, is the union of States, sovereign and independent within their own limits in their internal and domestic concerns, and bound together as one people by a general government, possessing certain enumerated and restricted powers, delegated to it by the people of the several States, and exercising supreme authority within the scope of the power granted to it, throughout the dominion of the United States. . . . Whatever it acquires, it acquires for the benefit of the people of the several States who created it . . . and when a Territory becomes a part of the United States, the Federal Government enters into possession in the character impressed upon it by those who created it. . . . The Territory being a part of the United States, the government and the citizen both enter it under the authority of the Constitution, with their respective rights defined and marked out; and the Federal Government can exercise no power over his person or property, beyond what that instrument confers nor lawfully deny any right which it has reserved. . . . For example, no one, we presume, will contend that Congress can make any law in a Territory . . . abridging the freedom of speech or of the press, or the right of the people of the Territory peaceably to assemble, and to petition the government for the redress of grievances. Nor can Congress deny

[35] 199 U. S. 448-9-50. See also p. 472.

to the people the right to keep and bear arms, nor the right to trial by jury, nor compel any one to be a witness against himself in a criminal proceeding.

"These powers, and others, in relation to rights of person, which it is not necessary here to enumerate, are, in express and positive terms, denied to the general government; and the rights of private property have been guarded with equal care. Thus the rights of property are united with the rights of person, and placed on the same ground by the fifth amendment of the Constitution, which provides that no person shall be deprived of life, liberty, and property, without due process of law. And an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offense against the laws, could hardly be dignified with the name of due process of law.

"So, too, it will hardly be contended that Congress could by law quarter a soldier in a house in a Territory without consent of the owner, in time of peace; nor in time of war, but in a manner prescribed by law. Nor could they by law forfeit the property of a citizen in a Territory who was convicted of treason, for a longer period than the life of the person convicted; nor take private property for public use without just compensation.

"The powers over person and property of which we speak are not only not granted to Congress, but are in express terms denied, and they are forbidden to exercise them. And this prohibition is not confined to the States, but the words are general, and extend to the whole territory over which the Constitution gives it power to legislate, including those portions of it remaining under territorial government, as well as that covered by States. It is a total absence of power everywhere within the domain of the United States, and places the citizens of a Territory, so far as those rights are concerned, on the same footing with citizens of the States and guards

them as firmly and plainly against any inroads which the general government might attempt, under the plea of implied or incidental powers. . . .

"It seems, however, to be supposed, that there is a difference between property in a slave and other property, and that different rules may be applied to it in expounding the Constitution of the United States. And the laws and usages of nations, and the writings of eminent jurists upon the relation of master and slave and their mutual rights and duties, and the powers which governments may exercise over it, have been dwelt upon in the argument.

"But in considering the question before us, it must be borne in mind that there is no law of nations standing between the people of the United States and their government, and interfering with their relation to each other. The powers of the government, and the rights of the citizen under it, are positive and practical regulations plainly written down. The people of the United States have delegated to its certain enumerated powers, and forbidden it to exercise others. It has no power over the person or property of a citizen but what the citizens of the United States have granted. And no laws or usages of other nations, or reasoning of statesmen or jurists upon the relations of master and slave, can enlarge the powers of the government or take from the citizens the rights they have reserved. . . .

"Now, as we have already said in an earlier part of this opinion, upon a different point, the right of property in a slave is distinctly and expressly affirmed in the Constitution. The right to traffic in it, like an ordinary article of merchandise and property, was guaranteed to the citizens of the United States, in every State that might desire it, for twenty years. And the government in express terms is pledged to protect it in all future time, if the slave escapes from his owner. This is done in plain words—too plain to be misunderstood. And no word can be found in the Constitution which gives Congress a greater power over slave property, or which en-

titles property of this kind to less protection than property of any other description. The only power conferred is the power coupled with the duty of guarding and protecting the owner in his right.

"Upon these considerations, it is the opinion of the court that the act of Congress which prohibited a citizen from holding and owning property of this kind in territory of the United States north of the line therein mentioned, is not warranted by the Constitution, and is therefore void; and that neither Dred Scott himself, nor any of his family, were made free by being carried into this territory; even if they had been carried there by the owner, with the intention of becoming a permanent resident."[36]

Therefore we see that in its opinion the court applied to Emerson who had carried Scott into the Louisiana Purchase Territory the same principles that the courts have applied to citizens in Alaska, in Utah and in all the Territories incorporated into the United States; for such questions as the rights of the citizen and his rights to property are defined by the Constitution and protected by the judicial department of the government. They are not political in the sense that they belong exclusively, not subject to final determination by the courts, to Congress. The distinction between political and judicial questions is clear and not difficult to see. The political department of government determines when and to what country the jurisdiction of the government applies. But the Territory having become a part of the United States, the judicial branch has the power finally to determine the *nature* of that jurisdiction that is to be exercised. The Constitution applies to Congress in whatsoever Territory it may legislate touching the personal and property rights of those within that country. But the judicial department is charged with the duty of determining the extent of the legislative power, confining the legislature to such powers as are given it by the Constitution. For instance: In 1839 the question arose in our

[36] 19 Howard, 447 to 452.

Supreme Court as to the jurisdiction of Buenos Ayres over the Falkland islands, and Judge McLean for the court decided that that was a political question.[37] In the same year Chief Justice Marshall said: "In a controversy between two nations concerning national boundary, it is scarcely possible that the courts of either should refuse to abide by the measures adopted by its own government."[38] Cooley cites others: the restoration of peace;[39] the *de facto* or rightful government of another country;[40] the authority of foreign ambassadors and ministers;[41] the admission of a State to the Union.[42] Such questions belong to the political department of government. So we see that the line had been plainly drawn before the Dred Scott decision. Since then the same marks of distinction have been carefully preserved; as, for example among the many cases, Mr. Justice Gray, delivering the opinion of the court in Jones vs. the United States, said: "Who is the sovereign *de jure* or *de facto* is not a judicial, but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens and subjects of that government."[43]

Benton talked about the court having "no right to pass from the private rights of an individual to the public rights of the whole body of the people."[44] Now and then we read similar statements in other writings. "But the Supreme Court has jurisdiction only for the purpose of determining the rights of individuals," says a recent writer. The trouble with such statements is that they are too narrow. In determining the rights of an individual, the first question is to determine the

[37] 13 Peters, 420.

[38] Foster vs. Neilson, 12 Peters, 313.

[39] U. S. vs. Anderson, 9 Wall. 56.

[40] The Hornet, 2 Abb (U. S.) 35; Gelston vs. Hoyt, 2 Wheaton, 246.

[41] Foster vs. Neilson, 2 Peters, 253.

[42] Luther vs. Borden, 7 Howard, 42; Marsh vs. Borroughs, 1 Woods, 463.

[43] 137 U. S. 212. See also Madison's Works, vol. 4, 144; Polit. Sci. Qt., vol. 5, 255.

[44] Hart's Hist. Told by Cont., vol. 4, 132.

power of the legislature over him, and how far and with reference to what and in what way that power must be exercised. "The public rights of the whole body of the people" are such only as are defined in the Constitution; and they must be determined and clearly defined before the "private rights of an individual" can be preserved and protected. Benton and those who follow him in this doctrine are trying to find powers in the Federal Government not limited by the Constitution, not defined by that instrument, and which exist outside of and beyond it in some such sense as the English talk of their constitution, a system of government where the courts can determine no act of Parliament an unconstitutional measure. "the Constitution of the American Empire," as one writer recently endeavored to find. Such doctrine is entirely out of harmony with both the letter and spirit of the American government; and badly out of line with the principles long since with us settled and become axiomatic. In this abnormal view of our government and of the functions of our Constitution, political questions would be quite different to what they are in the light of settled principles,—and by the latter alone courts are guided. When changes be needed in the American government the Constitution is amended by written declarations made by the people.

When in the Dred Scott opinion the court decided the Missouri Compromise void because Congress had no power to enact such a measure, it passed not into the realm of political questions; and, more than that, it established the first great precedent for measuring and for determining the power of Congress over property rights of an individual in a Territory. Upon and in harmony with this precedent has grown the now recognized American doctrine. The correctness and wisdom of the rule thus formulated is now a distinct feature of our government. Taney and the concurring majority showed not alone a clear grasp of the fundamentals of our government, but they evinced as well a high order of moral

courage in thus stepping boldly to the front against popular feeling throughout the northern section of the United States.

The orthodox method of interpreting the Constitution should be guarded with zealous care by the American people. Here and there in high places are a few who yet advocate the amendment of the Constitution by judicial construction. Such a condition would put the people at the mercy of the courts; it would be not only utterly subversive of popular government, but it would be destructive of a definite guide by which to order individual conduct. In the *Political Science Quarterly*, Oct., 1908, Professor John W. Burgess of Columbia University, recently Roosevelt Exchange Professor in the University of Berlin, declares: "The question is not that of a consolidation in principle of all governmental power in the hands of the central government, but a liberal interpretation of the powers already granted by the Constitution to the central government, so that the law will be made to harmonize with the already existing conditions in the world of fact. There is now a disharmony between the law and the fact. . . . The central government should regulate and control all commerce and intercourse except only such incidents thereto as naturally belong to the local police organization. It should create the code of commercial law, fix the law of marriage and divorce, and establish the general principles of criminal law. . . . At least so much, if not more, belongs to its natural domain."

In total disregard of the long settled rules of constitutional construction, oblivious of the American doctrine of the fundamental principles of popular government, this distinguished American writer and teacher would get what he wants by pure force of *liberal interpretation* by the courts. He is forced to this position in part, at least, because "conditions in the world of fact" are such that he could not incorporate his views of the "natural domain" of the Federal Government into the Constitution by the prescribed method of amendment. The American people differ from him in his view of many ques-

tions of government, as well as upon his method of attaining a practical application of his views; and were the Supreme Court to adopt such methods as he advocates and then take radical views of the sphere of the central government we would have "a disharmony between the law" and the people, the very strongest possible argument for leaving fundamental changes to the people and not to "a liberal interpretation" by the courts.

There is no doubt of the fact that as conditions in the world of fact change, changes of the Constitution will be needed. But it is to be devoutly hoped that the American people will preserve the now generally accepted and orthodox method, and themselves make the needed changes. The liberties, rights, and privileges of our people have been and are nobly preserved by the Supreme Court of the United States from the earliest days down to the present; and it behooves us so to guard that sacred forum as that no man shall be elevated to it whose influence may be lent to an insideous undermining of the *American Government.*

Therefore, the Presidency of the United States and composition of the Senate, the appointive power to that highest judicial office, should be the most weighty matter with the American voter. A President at most likely will serve but eight years; Senators are directly under the control of the people of the several States; and in many respects the acts of each are subject to final review by the Supreme Court; but the members of that court have life tenures, and compose the forum of last resort over matters involving both public and private rights of the people.

VIII.

THE MISSOURI COMPROMISE THE ONLY ANTI-SLAVERY TERRITORIAL ATTEMPT BY CONGRESS AFTER THE CONSTITUTION.

Although no one claims that a construction of the Constitution by Congress, by which it assumes to exercise certain rights of legislation, *no matter when begun or how long continued,* is to be taken as conclusive of the existence of the right to thus legislate, yet such a practical construction, "if nearly contemporaneous with the adoption of the Constitution, and continued by repeated instances through a long series of years," is of important weight. Such a construction should be taken into consideration by courts when passing upon the validity of that legislation. That is, of course, in doubtful cases or where the intention of the framers and ratifiers of the Constitution must be gathered from the history of the times and from the fundamental principles of the law in force and generally recognized at the time of the adoption. In cases where no light is needed to see what the Constitution means, for instance should Congress very early have enacted an *ex post facto* law, the exercise of the power could not override the Constitution. But there are many parts of the Constitution which cannot be understood except in the light of the history of the time and the law at the formation, amendment, or adoption. So just as we went to the legislation and adjudications of the States for light upon the word citizen as used in the Constitution, Mr. Justice Curtis, applying the same method of interpretation, finds what he holds to be "eight distinct instances, beginning with the first Congress, and coming down to the year 1848, in which Congress has excluded

slavery from the territory of the United States; and six distinct instances in which Congress organized governments of Territories by which slavery was recognized and continued."

Taking these instances in the reverse order in which he gives them, we find that those in which he declares "Congress refused to interfere with slavery already existing under the municipal law of France or Spain, and established governments by which slavery was recognized and allowed," are, the acts establishing the government for the North Carolina cession, now Tennessee, 1790; that establishing Louisiana in 1804; that establishing the Territory of Orleans, 1805; that organizing the Missouri Territory in 1812; and that establishing the Territory of Florida in 1822.[1] Certainly no one will contend that these acts of themselves are of important value, even were they what Judge Curtis claimed for them. Their testimony is of a purely negative nature, and their persuasive force depends upon the correctness of the contention as to the positive instances upon which the dissenting members of the court rested. If Congress had no authority to prohibit slavery in these Southern Territories where the Constitution found it already recognized by law, when those countries came under the jurisdiction of the United States, its non-interference was no more than it must do, and does not argue that it might have done what it did not try to do. Southern owners of slave property were minutely cautious to avoid Congressional interference with their property. While they, as a class, desired to be rid of slavery, yet they preferred that question left entirely *within local control*, as is well-known. So unless we have other important evidence, any language implying non-interference with property rights in slaves, can be taken as no more than done out of abundance of caution growing out of suspicion of Federal power and a fear of bad faith often entertained between the sections and on the part of each in the earlier days.

Turning, then, to what Judge Curtis regards as the

[1] 19 Howard, 619.

distinct, positive acts of practical construction of the Constitution by Congress and by the Presidents who signed the regulations, we find that he begins with the act of August 7, 1789, giving life to what without it all admit would have been the void and inoperative Ordinance of July 13, 1787, and includes the acts establishing the governments of Indiana Territory in 1800; the provision for the government of Michigan Territory in 1805; for the government of Illinois Territory in 1809; for the government of the Territory of Wisconsin in 1836; for the government of the Territory of Iowa in 1838; and that of 1848 for the government of the Territory of Oregon. These he regards as positive anti-slavery acts, in addition to the Missouri Compromise enacted for all of the Louisiana Purchase outside of Missouri and north of her north boundary, passed in 1822.

Curtis says that the act of August 7, 1789, was "that the Ordinance of 1787, one article of which prohibited slavery, 'should continue to have full effect.'" That is not the wording of the act. It is not the proper legal construction of the act. Such a construction is not borne out by the *practical operation* of the Ordinance as administered and enforced under the Constitution both locally and by Congress. As we all know, the Ordinance had been passed before the Constitution, and, as Curtis and practically all American scholars admit, *without authority* so far as any power to provide such a measure lay with the Congress of the Confederation. It was a suggestion by the representatives of the States in the Congress, and purported to be no more than "articles of compact between the original States and the people and States in said territory," and even then "alterable by common consent."[2] As forcibly shown by some of the judges concurring in the opinion in the Scott case, no one questions that the States had ample power to make any agreement upon this subject they saw proper; and whatever authority the Ordinance had before the ratification of the Constitution grew

[2] Poore, Charters and Consts.; Van Broclin vs. Tenn., 117 U. S. 159.

out of the mutual consent of the States. After the ratification of the Constitution the act which gave it life, gave it no power which could not have been conferred by Congress had an absolutely new provision in words all its own been enacted. At any rate what the Congress under the Confederation could do is no light upon what Congress under the Constitution can do. On and after the adoption of the Constitution Congress evidently regarded the Northwest Territory, for the government of which the Ordinance had been made by the mutual consent of the States, as without a government, because the caption of the act of August 7 says: "An act to provide for the government of the territory northwest of the river Ohio." Congress knew it could do no more than *adapt* the Ordinance "to the present Constitution of the United States," and in this same preamble it plainly said so. It will be admitted that any provision, regulation, or prohibition of the Ordinance that Congress by the Constitution was not given power to enforce necessarily remained inert and harmless. I believe it further will be admitted that Congress was given no power to enforce any thing in the Northwest Territory that it could not enforce in any Territory. The verbal provisions of the Ordinance depended upon the power of Congress; and the power of Congress depends entirely upon the Constitution. No intimation in the Constitution or in any of its contemporary history is made either in favor or against any right or power peculiarly in relation to the Territory over which the Ordinance as originally proposed was to have had jurisdiction. Even if by the Constitution no new government was established, and even if it were possible for an agreement or enactment or whatever we may regard it to remain "forever unalterable" regardless of future changes of the government or future enactments, as a few have thought concerning the Ordinance, misguided to a narrow view by the meaningless word "forever," it is certain that any agreement between the States, or any enactment by the legislature of a nation or of the States, be that as it may, must fail unless the Constitu-

tion provided some instrument for its preservation and enforcement. Therefore the situation resolves itself to the one question: Did the Constitution give Congress any power over property rights attaching to slaves in a Territory; and if so, what is it and in what part of the Constitution found?

Important light is furnished on this question by the preamble to the articles of the Ordinance. Having provided for the temporary government of the country, the document recites:

"And for extending the fundamental principles of civil and religious liberty, which form the basis whereon these republics, their laws, and constitutions, are erected; to fix and establish those principles as the basis of all laws, constitutions, and governments which forever hereafter shall be formed in the said territory; to provide, also for the establishment of States, and permanent government therein, and for their admission to a share in the Federal councils on an equal footing with the original States, at as early periods as may be consistent with the general interest:

"It is hereby ordained and declared, by the authority aforesaid, That the following articles shall be considered as articles of compact between the original States and the people and States in the said territory, and forever remain unalterable, unless by common consent."

It is patent, if the English language had the same meaning then it has now, that the framers of that instrument did not think they were wielding the sovereign power of a *nation,* for they called the States "these republics;" and they regarded the Ordinance as a "compact" between *republics,* sovereign, independent and distinct nationalities. But be that as it may. What I wish to emphasize here is that this Ordinance specifically declares that it was to provide for the establishment of States, and that the articles, the sixth and last of which was the prohibition against involuntary servitude, "shall be considered as articles of compact between the original States and people and *States* in the said territory." It purported to bind

the *future States* to be carved out of that country, just as much as it did to bind the Territories that were to precede the States. But, as we have seen, the highest courts of all the States once a part of that great Territory, the Supreme Court of the United States, and all important American authority, have decided that the Ordinance or any part thereof is not obligatory or binding upon any of those *States*. And this is true for the reason that, whether the Constitution established a new government or not, after the ratification of the Constitution such a *government existed* as that the States were absolutely independent and sovereign as to all things not within the peculiar jurisdiction of the Federal Government as *defined by the Constitution*. So that, after all, the whole question in all of its phases depends upon what powers the Constitution has conferred upon Congress. Finding it does not bind the States as its words purport to do, we need not expect a literal interpretation or application.

Hence, clearly, it is not by the *words* of the Ordinance that we must be guided, no more than did it verbally authorize the States of that territory to enact *ex post facto* laws, pass bills of attainder, or provide laws impairing the obligations of contracts. Had that Ordinance authorized a Territory for which it provided, to determine questions in trials of all common law causes by a jury of six, it is very clear that under the Constitution as interpreted by us, such a provision would have been the most inert surplusage. The Constitution has superseded all other authority, enactment, compact or agreement, as these patent instances readily show us.

Then, was the practical construction given the verbal anti-slavery article of the Ordinance such as indicated a belief that Congress had the power under the Constitution to preserve, continue, give life to and enforce the anti-slavery article? Mr. Justice Curtis answered in the affirmative. He has an extensive following,[3] and if there were no other reason, that would be sufficient to command our careful attention. In our

[3] For instance, see Burgess, The Civil War and the Constitution.

examination of the several instances upon which this reliance has been placed, it will assist us to get before the mind the exact wording of the several acts of Congress in establishing these various territorial governments furnishing what are regarded as the positive slavery prohibitions.

The first is the act establishing the government of the Indiana Territory, May, 7, 1800. Section two of that bill declares: "That there shall be established within the said Territory a government in all respects similar to that provided by" the Ordinance of July 13, 1787, for the government of the Northwest Territory; "and the inhabitants thereof shall be entitled to enjoy all and singular the rights, privileges and advantages granted and secured to the people by the said Ordinance."[4] The second is the act of January 11, 1805, establishing the territorial government of Michigan out of territory severed from Indiana. The same language is used, and in addition thereto is mentioned the act of August 7, 1789, which was the act of Congress giving validity to the Ordinance "as adapted to the present Constitution of the United States."[5] As the third we have the act establishing the territorial government for Illinois, again dividing Indiana, which follows the same words used in the act of January 11, 1805, establishing the Michigan Territory.[6] The fourth is the establishment of the government of the Territory of Wisconsin. Section twelve refers to the Ordinance in words used in the earlier acts, and declares the inhabitants entitled to "enjoy all and singular the rights, privileges, and advantages" conferred by, "and to be subject to all conditions and restrictions and prohibitions" imposed upon, the people of the Northwest Territory by the Ordinance.[7] We find the fifth in the act establishing the government of Iowa, June 12, 1838, dividing Wisconsin. Section twelve conferred upon the inhabitants "all rights, privileges and im-

[4] 2 Stats. at Large, 59.

[5] Ib. 309.

[6] See sec. two, 2 Stats. at Large, 515.

[7] 5 Ib. 15.

munities heretofore granted and secured to the Territory of Wisconsin and to its inhabitants."[8] In the sixth, the bill providing a government for the Territory of Oregon, August 14, 1848, we find the same language used in the other acts, applying the rights, benefits, immunities, and restrictions imposed upon the people of the Northwest by the Ordinance.[9] With the Ordinance, Judge Curtis and those who concur with him, find what they regard as the eight positive prohibition of slave property in a Territory in the Missouri Compromise, which is found in the eighth section of the bill authorizing the people of the Missouri Territory to form a constitution and State government, and for the admission of such State into the Union. As we know the slavery prohibition was specifically applicable to the territory acquired from France, being north of Missouri, and north of thirty-six degrees thirty minutes north latitude.[10]

Reading the Missouri Compromise act, we are most forcibly struck with the departure from the wording of the other acts, both prior and subsequent thereto. Neither before it nor subsequent to it in establishing the government of any Territory did Congress find the courage to use the same language. One sees in a moment that to find the legal force of all the other acts we must go back to the Ordinance, and not only back to its *wording* but we must find its restrictions and immunities as applied to and *enjoyed* by the people of the original Territory, to find the "rights, privileges and advantages granted and secured to the people" of either of the other Territories. "The restrictions, conditions, and prohibitions imposed upon the people" of the various new Territories were such only as had been imposed under the Constitution upon the people in the Northwest Territory. But the Missouri bill left nothing to be determined from the practical operation of the Ordinance under the Constitution. It says: "That in all

[8] Ib. 239.

[9] 9 Ib. 548.

[10] 3 Ib. 548.

that Territory ceded by France to the United States, under the name of Louisiana, which lies north of thirty-six degrees thirty minutes north latitude, not included within the limits of the State contemplated by this act, slavery and involuntary servitude other than in the punishment of crimes, whereof the party shall have been duly convicted, shall be and is hereby forever prohibited: *Provided always,* That any person escaping into the same from whom labor or service is lawfully claimed, in any State or Territory of the United States, such fugitive may be lawfully reclaimed."

Congress, evidently, saw that after the Constitution there was some question as to its authority to destroy slave property in a Territory or to forbid its presence there. It evidently did not mean to put itself in the position of determining the force of the Ordinance as adapted to the Constitution, and so each time, the Missouri bill being the one exception, it applied to the new Territory the restriction imposed upon or the privilege enjoyed by the people under the earlier act or acts. Congress simply appropriated whatever of the Ordinance was of force after the Constitution, leaving it to the people to make the application and to the courts to pass upon the force of that practical construction. Did, then, the verbal prohibition against slavery as found in the last of the articles of the Ordinance impose upon the people of the Northwest a restriction? How was it enforced by the territorial governments? Did the Territories affected by the Ordinance legalize and enjoy slave property? If so, was its legal and property nature maintained by the courts? We must answer these questions to find whether there were any anti-slavery regulations in any of the other acts, except the Missouri bill, upon which Judge Curtis relied. Other than the mere application to the new Territories as formed from time to time, of the restrictions enforced under the earlier governments, there is no intimation in any of the other acts as to slavery.

Prior to any division of the Northwest Territory there was no adjudication concerning the Ordinance involving the

property rights in slaves existing at its promulgation. "The sixth article of the compact, the slavery article, is imperfectly understood," wrote Dane in 1831.[11] True as late as 1831 it was much truer in the earlier years. Some of the anti-slavery people argued that that article destroyed existing slavery as well as made future slavery impossible. On the other hand the pro-slavery people and some of the most learned anti-slavery people took the opposite view. On its face it looked to some of the numerous slaveholders, as many of whom were from New England as were from the South, then in the Northwest, that they were about to be deprived of their lawful property without compensation or an opportunity to be heard. So from time to time petitions went up to Congress and to the authorities of the Territory asking, the one side that the apparent restriction of the Ordinance be removed; the other that it remain and be enforced. Under the treaty with France the theretofore French subjects, then holding as lawful property many negro slaves, and under the treaty known as Jay's by which the British vacated that part of the country, property of every kind, including slaves, was guaranteed to the people. As Hinsdale correctly says, these guaranteed to "settlers their property of every kind and protection therein, which applied to slaves as well as other property."[12] Article II. of the Ordinance declared that the inhabitants were to have "judicial proceedings according to the course of the common law. No man shall be deprived of his liberty or property but by the judgment of his peers, or the law of the land, and should the public exigencies make it necessary, for the common protection, to take any person's property . . . full compensation shall be made for the same." So it is not strange that we find the best legal ability of that section quieting the fears of the people by assuring them that the existing slave property was not and should not be touched. Property in slaves was just as much legal property as other property,

[11] 1 Indiana Hist. Soc. Pubs., 75.

[12] Old Northwest, 339; Dunn, Hist. Ind. 252; Winsor, The Western Movement, 288; Burnet, Notes (Cincinnati, 1847), 282, n. et seq.; Parkman, The Old Regime in Canada, 254.

and to have destroyed it without compensation and by compact would certainly have been a deprivation of property without the judgment of the owner's peers and contrary to the course of the common law. Construing each article of the Ordinance in the light of the others and looking at it as a whole, it is plain to see that when St. Clair, the governor from the North, and Harrison, the governor from the South, assured the people that no vested property rights had been affected, they were fortified behind the Ordinance as it appeared in the light of the most approved rules of construction. At any rate, at no time were the property rights in such slaves as were in the Territory at its formation ever disturbed.

When the legislature of the Territory met in 1790 it was importuned by petition from citizens to provide some pro-slavery law, legalizing the admission of slaves from outside the Territory, thus removing any doubt upon the question, quieting the fears of those holding slaves, and at the same time furnishing a source of much needed labor. At first the legislature declined to entertain the prayer; but in November of this same year this body, a majority of whom were Northern men, relented and appointed a committee, *directing* it to prepare a bill "declaring the admission of persons of color by indenture."[13] This meant nothing less than the most complete slavery, the indenture being no more than a farce as to the negro and a formality of registration as to the master. Appointed late in the session, the committee, though acting in all good faith, did not get its report filed before the close of the session. The ablest lawyers of the Territory and among the ablest men in the legislature did not doubt the power of that body to provide a pro-slavery law; and, as Dunn says, "the appointment of the committee indicates a willingness on the part of the legislature to permit the introduction of negroes in a servile condition until some other consideration intervened."[14]

April 30, 1802, Congress divided the original Territory,

[13] St. Clair Papers, vol. 2, 448; Dunn, Hist. Ind.

[14] Hist. Ind., 293.

authorizing the people in the eastern part to form the State of Ohio. Thus as to the Ohio part the territorial period ended with no further light as to that section concerning property rights in slaves during the Territory. But not so as to the remaining part of the Territory, thereafter for a time known as Indiana. For the first few years of the Indiana Territory the governor and judges of the court constituted the legislative body. To these the people now turned with the result that Sept. 22, 1803, a law was enacted declaring slaves from the States and other Territories "under contract to serve another in any trade or occupation shall be compelled to perform such contract specifically during the term thereof." Penalties by lashes were provided to prevent trading with slaves, and negroes were forbidden to purchase servants other than their own color.[15] Petitions both pro and con were sent to Congress, but that arm of the Federal Government, referring the petitions to committees, retained a respectful acquiescense, while the legal nature of the slave property under the protection of the Territory steadily strengthened.

In 1803 the first elective legislature of the Territory of Indiana met. It lost no time in legalizing the acquisition and holding of slave property, passing the famous indenture law which, as we have seen, was ratified by the fundamental law of Illinois. This law differed in no essential from any pro-slavery law in so far as it legalized the property rights existing in the slaves affected thereby or coming thereunder. Under it any person owning slaves in any State or Territory, or any person purchasing negroes or mullatoes, might, such slaves being over fifteen years old, bring them into the Territory: "provided, the owner or master within thirty days should take them before the clerk and have an indenture between the slave and his owner entered upon record specifying the term that the slave was to serve his master. . . . The period of the indenture was usually ninety-nine years." Children born of these slaves were born slaves, but the law provided they should

[15] Dunn, Hist. Ind. 315.

be emancipated after a term of years,—a period long enough to give the master an opportunity to conceal the actual age until the best years of life had been spent in bondage; after which, of course, most masters did not object to be rid of the liability for support. Long after the Territory of Indiana had been divided into and had become the States of Indiana, Michigan and Illinois, slaves were held in each as property under and by virtue of this law of the Territory. The pretence of the negro's consent was the merest farce; while as to slaves under fifteen years owners and masters were not required to resort to the pretence of consent! It is notorious that the law was supported and upheld as within the power of the Territory by both its courts and the courts of the States. This is particularly true of Illinois. Slaves were being held under this law in Michigan as late as 1847.[16] The people demanded the law, for at that time the majority were pro-slavery.[17] Dunn says: "This act at the time was satisfactory to the majority of the people."[18]

In 1806 the territorial legislature made the property nature of slaves held under this law doubly sure, declaring them property subject to execution and sale thereunder just as any other personal property; and at the same time provided a slave code similar to those found in other slave-labor communities.

From time to time the attention of Congress was called to this law and to the fact that slaves were being introduced into the Territory and held pursuant thereto, but Congress wilfully acquiesced. It not only acquiesced but actually ratified the power of the Territory and sanctioned the legal nature of the slave property existing under this law and the slave code protecting it when it admitted the State of Illinois into the Union. Having been detached, Illinois continued the indenture law and slave regulations, adding thereto some strin-

[16] Hinsdale, The Old Northwest, 341; Edwards, Hist. Ill.; Campbell, Polit. Hist. Mich. 246.

[17] E. A. Snively, Slavery in Ill., (1901) Ill. Hist. Lit. Pubs., No. 6, 52.

[18] Hist. Ind. 330.

gent anti-negro laws. Quite a number of negroes were being held in slavery under these laws at the time that section applied for permission to form a constitution under which to be admitted into the Union. Congress knew this fact. Congress knew that for years the verbal anti-slavery article of the Ordinance had been void in practical operation; in fact, had been nullified by both the legislature and the courts. April 18, 1818, Congress granted Illinois permission to form a constitution, prescribing that such constitution and the State government so formed should be "republican and not repugnant to the Ordinance." The people formed their constitution, and in article six thereof it was specified that "neither slavery nor involuntary servitude shall *hereafter* be introduced into this State;" recognizing the legality of the slave property then being held under the laws of the Territory, and of course the validity of those laws. The existing slavery was untouched, beyond all question as is admitted and as has been decided by the highest court of the State.[19] Children born of the slaves held under the law of the Territory either during the territorial period or after were born slaves, though bound to serve for only a term of years.[20] Standing upon this ratification, recognition, and continuance of the legal effect of the law of the Territory, the people applied to Congress for admission as a State. On December 3, 1818, Congress declared this "constitution, and State government, so formed, is republican, and in conformity to the principles of the Ordinance," and thereupon the *slave* State of *Illinois* became one of the United States. We are not surprised to hear Snively in 1901 say: "We can scarcely realize that our own State once tolerated slavery; that for more than a quarter of a century Illinois was as absolutely a slave State as was Mississippi."[21]

Now, was slave property repugnant to the Ordinance? If so a recognition of the legal nature of the slave property

[19] Phoebe vs. Jay, Beecher's Breese, 268; Chaisser vs. Hargrove, (1836) 1 Scammon, 317; William vs. Jarot, (1844) 1 Gil. 120.

[20] Boone vs. Juliet, 1 Scammon, 258.

[21] Slavery in Ill., Ill. Hist. Lit. Pubs., (1901) No. 6, 52.

existing under the law of the Territory, would, unquestionably, have been repugnant to the Ordinance. But Congress declared that this recognition of the vested property rights made legal by the law of the Territory, was *"in conformity to the principles of the articles" of the Ordinance. This* certainly means the principles of the Ordinance that *survived* after the Constitution: that Congress had no power to enforce the verbal anti-slavery article of the Ordinance; that slaves in a Territory were legal property, and that such property in a Territory by Congress could not be destroyed without just compensation to be determined before some tribunal or court where the affected party could be heard.

But just now the most significant fact is that within the jurisdiction of the Ordinance, in the Old Northwest Territory, before the formation of the States, the people enjoyed the property in slaves being held by them at the promulgation of the Ordinance; they brought slaves into the Territory from other places and held them during life; and the children of these imported slaves were born into slavery, and the property therein was a privilege and an enjoyment and a right permitted to the people by the local laws and sanctioned by Congress. This acquiescence by Congress is all the more significant when we remember that "the laws enacted by the territorial legislatures are alike subject to modification or repeal by the action of Congress."[22] This has been recognized so often as fundamental since the earliest time down to the present that it will not be disputed. Till disapproved the laws of the territorial legislature are valid and operative.[23] The slave property enjoyed by the people of the Northwest Territory was legal property held under valid laws. Now, Congress said in the establishment of the Territory of Michigan that the people should enjoy all and singular the rights, privileges and advantages granted and secured to the people of the territory of the United States northwest of the river Ohio. So in establish-

[22] Ter. vs. Lee, 2 Mont. 132.

[23] Miner's Bank of Iowa, (1851) 12 Howard, 1; Brunswick First Nat. Bk. vs. Yankton County, (1879) 101 U. S. 133; U. S. vs. McMillan, (1897) 165 U. S. 510; Cope vs. Cope, (1891); 137 U. S. 686, are a few of the many leading cases.

ing the other territorial governments, upon which acts Judge Curtis relied, we find Congress granting to them no more and *no less* than had been granted and secured and enjoyed by the people under the preceding acts. There is not an instance where Congress enforced against the people of any section of the Old Northwest the anti-slavery article of the Ordinance; but as we have seen she did ratify its complete abrogation, rendering it as null and void as though it had never been penned. Congress declared that abrogation of the anti-slavery article of the Ordinance not repugnant to its principles. Congress has thus given the most emphatic practical construction of the Constitution to the effect that under it the Federal Government had no power to forbid or destroy property rights in slaves.

Hence, upon this point my contention is that when we take into consideration the peculiar wording of all the acts other than the Missouri Compromise, the actual violations of the verbal prohibition of the Ordinance, their support by the local courts, the acquiescence of Congress and its final explicit declaration that the principles of the Ordinance had not been violated, at least such doubt on the part of Congress is shown as that the various acts upon which Judge Curtis and others relied are not entitled to weight as positive practical anti-slavery laws enacted by Congress. This conclusion must follow, it is clear to me, whatever may have been the actual value of the Ordinance; for whether Congress had the power to enforce the anti-slavery article of that compact is not shown by any attempt at such enforcement; and certainly one important opportunity at enforcement was missed when Congress failed to take notice of the pro-slavery laws of the Indiana Territory.

IX.

DUE PROCESS OF LAW.

"The Territory, being a part of the United States, the government and the citizen enter it under the authority of the Constitution, with their respective rights defined and marked out; and the Federal Government can exercise no power over his person or property, beyond what that instrument confers, nor lawfully deny any right which it has reserved.

"Thus the rights of property are united with the rights of person, and are placed on the same ground by the fifth amendment to the Constitution, which provides that no person shall be deprived of life, liberty, or property without *due process of law*. And an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offense against the laws, could hardly be *dignified with the name of due process of law*."[1]

In answer to this Mr. Justice Curtis replied: "Therefore, if the prohibition on all persons, citizens as well as others, to bring slaves into Territory, and a declaration that if brought they shall be free, deprives citizens of their property without due process of law, what shall we say of the legislation of many of the slave-holding States which have enacted the same prohibition?"

One feels painfully surprised that Judge Curtis should have used this argument. Certainly many of those not lawyers were misled thereby, to say the least of it. It was an argument that made splendid ammunition for the politicians

[1] 19 Howard, 449-50. The Italics are mine.

and which the unscrupulous among them used to incite popular disloyalty.

It is all too easy to lose sight of the fact that the court had in this case under consideration the field and limitations of *Federal power*. What was true of a State government was not necessarily true of the *United States* Government. Those who framed and the people who ratified the Constitution were afraid of too much Federal power, and so they hedged the general government about with limitations many of which did not maintain in the States in respect to the State governments. In fact, as set out in the preamble of the joint resolution, adopted September 25, 1789, proposing the first ten amendments, "The conventions of a number of the States having at the time of their adopting the Constitution expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added" to the Constitution, Congress proposed the amendments "restrictive" as to Federal power only. Of the amendments, "declaratory and restrictive," the fifth, providing for *due process of law*, was one. This amendment with others was shortly adopted after its proposal. That it is not a limitation on the powers of the State, is universally conceded. In 1833 Chief Justice Marshall said that the Constitution was not established "for the government of the individual States."[2] That this is true, and that the due process of law that is meant in the fifth amendment is a limitation on the *powers of Congress,* and *not* on the powers of the States, are most firmly and unquestionably established in this country.[3] This fundamental truth was clearly known to both Curtis and McLean, and each alone as well as in connection with the Supreme Court, had repeatedly acted upon and applied it.[4]

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[2] Barron vs. Baltimore, 7 Peters, 247.

[3] Ohio vs. Dollison, (1904) 194 U. S. 447; McFaddin vs. Evans. Snider Buel Co. (1902) 185 U. S. 509; Howard vs. Kentucky, 200 U. S. 164; 10 Amer. & Eng. Ency. of Law, 2nd ed., 288, and the unbroken line of decisions there cited.

[4] Fox vs. Ohio, (1847) 5 Howard, 410; Livingston vs. Moore, (1833) 7 Peters, 551; U. S. vs. Keen, (1839) 1 McLean (U. S.), 429; and the other decisions cited in 9 Federal Stats. Anno., 256.

Since the fourteenth amendment—not even pictured in the wildest dreams of the most vindictive at the time of the Dred Scott decision—there is in the Constitution a provision with reference to the States similar to that of the fifth in reference to the United States; but, since the fourteenth amendment has no bearing on the case before us, its consideration has no place in this examination. We refer to it merely to emphasize the fact that it has been made a part of the Constitution long since the decision of this case.[5] Hence, Mr. Justice Curtis' argument, however he may have meant it, being absolutely without foundation in its application to the Federal Government, for the powers of which alone the court was enquiring, served no purpose other than to mislead those not having a clear conception of the nature of American government. There was entire lack of the analogy suggested by Curtis. His argument merely served the purpose of strengthening the groundless impression that the opinion of the court in practical results would respread slavery. Undoubtedly, upon this point a State could do many things Congress could not; for the State legislated entirely free from the due process restraint of the Constitution.

The court's application of the due process restriction and declaration to Congress, the legislative branch of the Government, it is settled, was entirely proper. That Congress cannot make any process due process of law, has been long the settled law of this country, and this principle had been reaffirmed by the Supreme Court in 1855,[6] at the very time the Scott case was being heard; and the principle is not questioned.[7] A statute may be anything other than due process of law, as Daniel Webster so forcibly argued in 1819 in the famous Dartmouth College Case.[8] Said he: "The meaning is, that every

[5] A construction of the fourteenth amendment may be seen in Hurtado vs. Cali. 110 U. S. 328; Maxwell vs. Dow, 176 U. S. 581; French vs. Barber, (1901) 181 U S: 324; Hibben vs: Smith, 191 U. S. 325; John S. Wise, Citizenship; and McGehee, Due Process of Law, 35 et seq.

[6] Maury vs. Hoboken Land Co., 18 Howard, 277.

[7] Chicago, etc., vs. Chicago, 166 U. S. 226, 235, 240; Harvey vs. Elliott; 167 U. S. 409.

[8] 4 Wheaton, 581.

citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society. Everything which may pass under the form of an enactment, is not, therefore, to be considered the law of the land. If this were so," he illustrates, "acts reversing judgments, and acts directly transferring one man's property to another," and all such, "in all possible forms, would be the law of the land. Such a strange construction would render constitutional provisions of the highest importance completely inoperative and void. It would tend directly to establish the union of all powers in the legislature. There would be no general permanent law for courts to administer, or for men to live under."[9]

In re Kennedy the Supreme Court of the United States held that "due process of law in the fifth amendment referred to that law of the land which derives its authority from the legislative powers conferred on Congress by the Constitution of the United States, exercised within the limits therein prescribed, and interpreted according to the principles of the common law."[10] What were the applicable principles of the common law by which we are to be thus guided in finding due process? McGehee gives a definition, following the settled construction, embodying two of the most important of these principles. He says "due process implies the administration of equal laws according to established rules, not violative of the fundamental principles of private right, by a competent tribunal having jurisdiction of the case and proceeding upon notice and hearing."[11] There must be a *competent tribunal* having jurisdiction of the case, and proceeding upon *notice* and *hearing*.[12] The Missouri Compromise provided no tribunal, no court of justice, for depriving the owner of his property; he was given no *opportunity to be heard*. "Law in its regular

[9] "Due process of law" and "law of the land," are in legal phraseology synonomous terms. McGehee, Due Process of Law. See Webster's argument before the Supreme Court of the United States in Kennedy's Life of Wirt, 11. 82, and Webster's Works. Farrar, Report of Dart. College Case; J. M. Dillon, Marshall's Decisions, 299 et seq.

[10] 136 U. S. 436.

[11] Due Process of Law, (1906) 49; Wise, Citizenship, 250.

[12] Gilpin vs. Page, 18 Wall. 350; Harvey vs. Elliott, 167 U. S. 409.

administration through courts of justice is due process of law," said the Supreme Court in Caldwell vs. Texas.[13] Certainly it is settled in this country that there must be a tribunal of some kind where a party can be heard before his property be taken.[14] Even laws providing for and requiring taxes, it is settled, must afford a tribunal and an opportunity where the party liable can be heard; or otherwise that small part of one's property necessary for the support of government cannot be taken; because if taken without opportunity to *each* individual to be heard, it would be lacking in due process of law.[15]

The Missouri Compromise was not a *general* rule of society; it affected and injured a class only. Said the Supreme Court in *Ex parte* Virginia, neither the government, nor the officers or agents by whom its powers are exerted, "shall deny to any persons within its jurisdiction the equal protection of the laws."[16] The Missouri Compromise rendered unequal the protection of the Federal Government. All the property rights created by the laws of Massachusetts, in property carried to the Territory affected by the compromise law, received full protection. Some of the property rights created by Virginia, just as much property by the Virginia law as the property of Massachusetts was such by her law, in property carried to the same Territory, were *extinguished*, not only without a hearing but without an opportunity to be heard, and utterly destroyed without compensation. The Virginian did not have the equal protection with his Northern brother. To the Southerner there was lacking the enjoyment of "that fundamental maxim of distributive justice, *suum cuique tribuere*."[17] There is no due process unless the laws "operate on all alike."[18]

[13] 137 U. S. 692.

[14] McMillan vs. Anderson, 95 U. S. 41; Clearing House vs. Coyne, 194 U. S. 508, Hayer vs: Reclamation, etc., 111 U. S. 701.

[15] Longyear vs. Toolan, (1908) 209 U. S. 414; Security Trust Co. vs. Lexington, (1906) 203 U. S. 323.

[16] 100 U. S. 339.

[17] Hurtado vs. Calif., 110 U. S. 516.

[18] Giozza vs. Tiernan, 148 U. S. 662.

No one can read the proceedings of the constitutional convention and in the various State conventions which ratified the Constitution, without being impressed with the fact that the framers of that instrument certainly had assured the slaveholding States that the Federal Government should be given no power to jeopardize slaves recognized as property by local laws; and that the *framers* of the Constitution recognized the *property* nature of slaves as differing in *no respect whatever* from other property. When the constitutional convention was selecting a committee to draft the new form of government, General Pickney of South Carolina "reminded the convention that if the committee should fail to insert some security to the Southern States against an emancipation of slaves," he should be bound by duty to his State to vote against their report.[19] Rutledge of the same State, when the convention had the articles relating to slave property under consideration, said, that "he never would agree to give a power by which the articles relating to slaves might be altered by the States not interested in that *property.*"[20] When the convention had under advisement some just method of raising revenue for the general government, Samuel Chase "observed that negroes are property, and as such cannot be distinguished from lands or personalties held in those States where there are few slaves."[21] As the clause of the Constitution authorizing a duty on imports first stood, slave property was not included. Wilson declared that as it thus stood it was "in fact a bounty on that article."[22] Notice, the said *article*. King declared that "whilst every other import was subject to the" proposed tariff, the omission of slave property was "an inequality that could not fail to strike the commercial sagacity of the Northern and Middle States."[23] Sherman of Connecti-

[19] 2 Madison's Debates, 1187.

[20] Ib. 1536.

[21] Ib. 28.

[22] Ib. 1394.

[23] Ib. 1395.

cut opposed the tax on slave-importations because it "implied that they were property."[24]

In fact just as the Northern States were uneasy for their *manufacturers* and as their interests were watched at every step during the constitutional convention,[25] so the States where slave labor was legal property, guarded its *property* nature at every point,—and with the knowledge and help of all the States.

That this is true and that had it been otherwise the slave labor States would not have ratified the Constitution, is incontrovertibly shown by the debates in the various ratifying conventions, *North* and South. In the debates of the Virginia convention which ratified the Constitution and while it was being discussed, Patrick Henry said: "Slavery is detested. We feel its fatal effects—we deplore it with all the pity of humanity." Then he expressed the fear that Congress by the Constitution had been given power over the subject of slave property, concluding: "This is a local matter, and I can see no propriety in submitting it to Congress." But Governor Randolph, who had been a delegate to the convention that drew the Constitution, at once replied to Henry, declaring that the *delegates in the convention believed and meant that the terms of the Constitution should and had amply secured property* in slaves against any control, regulation, or interference by the Federal Government.[26] When the people of North Carolina met in convention to consider the proposed Constitution, there was considerable debate over the three-fifths clause. Davie, who had represented his people in the constitutional convention, said: "The Eastern States had great jealousies on this subject [of taxation and representation]. They insisted that their cows and horses were equally entitled to representation; that the one was property as well as the other." That is, the slaves comprehended in the "three-fifths of all other persons" were *property* in the legal sense in which cows

[24] Ib. 1396.

[25] Ib. 1446.

[26] 3 Elliot's Debates, 590, 599.

and horses are property. He then explained that the Northern States finally compromised, omitted from the basis of taxation and representation their cows and horses, because of the smallness of the population of the Southern States.[27] If the slave ever were "reduced to the level of the horse," it was by measures incorporated into the Constitution by the coöperation of the Northern States,—provisions the Supreme Court must enforce and which it could not change.

Discussing this same provision before the New York ratifying convention, Hamilton, who had been very active in the constitutional convention and who was ultra-Federal in construing the powers of the government, explained: "It is the unfortunate situation of the Southern States to have a great part of their population as well as property in blacks. The regulation complained of was one result of the spirit of accommodation which governed the convention; and without this indulgence no union could possibly have been formed. . . . But the justice of this plan will appear in another view. The best writers on government have held that representation should be compounded of persons and property."[28]

There can, therefore, in the light of the history of the Constitution, get it from what source we may, be no successful question of the fact that purposely the legal nature of slave property had the same recognition in the Constitution as did the legal nature of other property. Were further evidence needed to strengthen this, it would be found in the fact that *before* the Constitution when the American authorities came to arrange terms of peace with England slave property was put upon the same ground as other property; and that *after* the Constitution, Congress, as elsewhere said, followed up this by requiring England to pay a *property value* long after this property had been beyond the jurisdiction of American authority.

There being, then, no distinction as to the property nature of slaves, that property being affirmed in and guaranteed

[27] 4 Elliot, 31.

[28] 2 Elliot, 237.

by the terms of the Constitution *at the time of its adoption,* it is the more certain that after the incorporation of the fifth amendment, made *after adoption* to quiet the fears of those who doubted the original provisions, made the *property* rights existing in slaves as secure from Federal destruction as legal language could express,—for that amendment was a restriction upon the Federal Government exclusively.

Similar principles to those which show the unfairness of Mr. Justic Curtis' argument with reference to due process in its application to the States, also expose the error of his argument wherein he insists: "A citizen of the United States owns slaves in Cuba, and brings them to the United States, where they are set free by the legislation of Congress. Does this legislation deprive him of his property without due process of law? If so, what becomes of the law prohibiting the slave trade? If not, how can a similar regulation respecting a Territory violate the fifth amendment of the Constitution?"[29]

Any intelligent person will readily agree that what is property and what may become property are questions that any people may regulate in establishing the government under which they are to live. It is a most fundamental truth that that is property between the citizen or subject and his government which those who exercise the sovereignty in establishing the government have said shall be property. It was provided in the Constitution that property rights might attach to negro slaves in two ways: to "such persons as any of the States now existing shall think proper to admit"[30] being negroes, until 1808 by *importation;* and by *birth* of a slave mother in any State the laws of which legalized slave property. During the time slaves might become property by importation, it was regarded as fair to the Federal Government that it be permitted to *tax* or impose a tariff upon that property as a reward for the *right of ownership.* Too, it was regarded as fair to all States so long as they wished to continue to recognize this class of property, that it be protected by the

[29] 19 Howard, 627.

[30] Art. 1, Sec. 9.

Federal Government from escape, and to this end the fugitive slave provision was written in the Constitution.[31] After 1808 Congress was given the power to limit the States to one *source* of slave property: *birth within the State and under the jurisdiction of its slave property laws.* Thus the Federal Government was given power not to destroy slave property after the property right had vested, but to limit the source of its becoming property. And Congress, we remember, has no power not given it by the Constitution; and that instrument is always interpreted as understood when adopted.

The fifth amendment was for the protection of that as property which the Constitution had left to the States or any one of them to recognize as property. It could not protect that which the very instrument of which it was a part had provided should not become legal. Slaves in Cuba could not become property in any one of the United States or anywhere within the jurisdiction of the Federal Government, because of the specific limitation of the Constitution upon the source of that property right, and also because in the several States there were regulations which confined the attaching of the property right to such negroes as were born of slave mothers within the jurisdiction of the State law. Having attached by the method prescribed by the Constitution, the Federal Government was given no power to destroy and was required to prevent any State from impairing the right as to a fugitive.

Chief Justice Taney and the majority of the court legally and historically are sustained. The Constitution was applicable to the Territory for which the Missouri Compromise was enacted; Congress could pass no law prohibiting slavery in that Territory unless authorized by the Constitution; no such authority was given Congress by the Constitution, because by specific provision the legality of slave property existing by virtue of State law was recognized; and, outside of the import question, no power was conferred except the duty of guarding and protecting the right created by the State. The Missouri

[31] Art. IV, Sec. 2.

Compromise prohibition was not political; Congress is not the final judge of what laws defining property rights are needful for a Territory. Had it even had power over slave property in a Territory Congress could not have destroyed those property rights without just compensation, and the measure of such compensation being unquestionably judicial, such questions must have been left to some tribunal where the party affected could have been heard.

X.

SLAVE PROPERTY UNDER THE CONSTITUTION AND OUTSIDE OF A STATE.

That Chief Justice Taney was correct in applying to Congress when legislating for a Territory the restrictions, limitations, and powers as defined by the Constitution, is now the settled doctrine in America. The recognition that this doctrine now receives is most gratifying. The correctness, weight, and judicial force of the court's judgment as to the power of Congress over property in general in a Territory, is no longer seriously disputed; but some yet insist that as to slave property the principles were not applicable because it is said that that class of property was an exception. Of course no one pretends to point to any specific words or provisions of the Constitution in support of this claim. There are none. They rest their argument, again following Benton, upon the contention that property in a slave could exist only while the slave remained within the geographical limits of the State the laws of which legalized this property, and that having passed beyond the State it ceased to be property. It is perhaps no presumption in me to say that I cannot see how any mind with legal training can hold this view after following the powerful logic of Taney, especially after admitting, as is now done, that he was correct unless the Constitution itself recognized slave property as the single "and wholly exceptional class." As we have just seen, the history of the formation and of the ratification of the Constitution proves that that instrument knows no distinction. But the fact that an eminent lawyer, without attempting to cite any authority for his claim, recently reasserted the theory that slave property was a wholly

exceptional class, makes it proper to give a more detailed study of the meaning of the word property as used in the Constitution in its applicability to slave property outside of a State the laws of which recognized it as property .

In 1901 Mr. Justice Brown, in "announcing the conclusion and judgment" of the Supreme Court of the United States in Downs vs. Bidwell,[1] said: "The difficulty with the Dred Scott Case was that the court refused to make a distinction between property in general, and a wholly exceptional class of property. Mr. Benton tersely stated the distinction by saying that the Virginian might carry his slave into the Territories, but he could not carry with him the Virginia law which made him a slave."[2] That is, a slave was property by the law of the State merely and only while within the geographical limits of the States by the laws of which the slavery was legal.

It is interesting to observe that Mr. Justice Brown admits that if we grant that the Constitution knew no difference between slave property and property in general, as to its property nature, then the decision that the Missouri Compromise was unconstitutional furnishes one of the strongest authoritative precedents for measuring the power of Congress in legislating for a Territory; in fact he says it settles the matter if we are to grant the court's argument as to the nature of slave property.

Under the laws of States where slave property was recognized, the property right to the labor of the slave was just as absolute, as no one has ever questioned, as was the right attaching to any legal property. Moving outside of the geographical limits of the State, and into a Territory, the owner of any property did not carry with him the law of the State. His gun, for instance, in the Territory was property because in all the States at the adoption of the Constitution the word *property* comprehended *guns,* and so in the Constitution the word property comprehends guns and, by its terms,

[1] 182 U. S. 224.

[2] Ib. 275.

it preserves and protects in the emigrant's gun what the State law created. Thus, by the terms of the Federal Constitution as to all similar property, it is admitted by all, the right while the object is in a Territory continues to be a property right. Now, that the word property was practically universally understood to comprehend slave property *as yet property* after the object had been carried beyond the geographical limits of the State law creating or recognizing it, *even if the due process provision had not been added to the Constitution,* there is the most abundant proof. There is not only abundant evidence of this fact, but there is nothing of consequence in the history of this country to show that the word property as used in the Constitution, for instance in the fifth amendment, was meant to have any other meaning than that so generally ascribed to it; that is, that it comprehended any object having once been property by virtue of a State law, unless the owner voluntarily surrendered his property right. For instance a wild lion in the mountains of Africa was not private property. Captured and brought to Massachusetts the State law at once invested the owner with a property right. Carried into territory of the Louisiana Purchase in 1819, for instance, the Constitution protected and preserved the property right, although admittedly the State law was not carried to the Territory; and, unless turned into the jungles by the owner, the property right in that lion continued solely and alone because protected by the Constitution because the word property therein comprehended such objects. Similarly and for similar reasons of the private domestic property rights existing in a negro slave.

Now we see, again, the great importance of the emphasis given in a previous chapter to the truth that the meaning a word or provision of the Constitution was understood to have when incorporated into that instrument, is retained and enforced until changed by amendment. Hence the value of early instances in which the property rights existing in slaves were given authoritative recognition after the slave

had been carried beyond the positive law creating and recognizing the right as *property*. Of such, and of judicial recognition of such rights, I can give only representative instances, none of which are given in the opinion in the Dred Scott Case; but I believe them ample to sustain the court in its construction of the word property as used in the Constitution; and in it application to slave property carried to a Territory; and more than ample to show the error of McLean, Benton, and later Mr. Justice Brown.

Many instances might be cited to show that before the American Revolution, it was universally understood that the property in a slave remained property no matter where the negro should go or be carried. I can here give only two such illustrations, representative and of peculiar historic interest.

July 16, 1750, M. de la Joquiere, the French governor of New France, writing from Quebec to M. de Rouelle concerning an exchange of prisoners between the English authorities in America and himself and his military staff, said: "In regard to the negro, in the possession of Sieur de la Corne St. Luc, I thought proper not to send him back, every negro being a slave wherever he be, as I have observed in the procesverbal. Besides, herein I only do what the English themselves did in 1747. Ensign de Malbronne, on board *Le Scrieux*, had a negro servant who was at first taken from him; I took pains to reclaim him, the English refused to surrender him on the same ground, that every negro is a slave, wherever he happens to be."

Nor was this an *ex parte* proceeding; it had the official sanction of the British American authorities. In the minutes concerning the exchange of prisoners between the late belligerents, a war between England and France just having been terminated, we see that the court was composed of the governor of New France and his civil and military officers of the proper rank, and Sloddert, lieutenant of the New York infantry, Antony van Scheick, captain of New York militia, and

others. Their written minutes say: "And in regard to Samuel Fremont, a negro, in the service of Sieur de la Corne St. Luc, Lieutenant of Infantry, we have ordered that he remain in the Colony, all negroes being slaves in whatsoever country they reside." This agreement was signed by both the English and American officials.[3]

July 18, 1764, "Articles of Peace, Friendship and Alliance" were concluded between Sir William Johnson, "His Majesty's Sole Agent and Superintendent of Indian Affairs, for the Northern District of North America," on behalf of his Britanic majesty, and "the Huron Indians of Detroit." In article second the Hurons agreed: "That any English who may be prisoners, or deserters, and any Negroes, Panis, or other slaves among the Hurons, who are British property, shall be delivered up, within one month, to the Commandant of the Detroit, and that the Hurons use all possible endeavors to get those who are in the hands of the neighboring Nations; engaging never to entertain any deserters, fugitives, or slaves; but should any such fly to them for protection, they are to deliver them up to the next commanding officer."

In article five it was stipulated on the part of Great Britain, "that said Indians shall enjoy all their original rights and privileges." This solemn and mutual compact was regularly signed and sealed by all the high contracting powers. After each chief's name was his tribal seal, "the whole being first duly explained to them."[4]

It will be observed that this treaty, per se, acknowledged the independence and sovereignty of these Nations; and it pledged the faith of the English Government to maintain them inviolate. By treating with these Nations she acknowledged them to be entirely beyond the jurisdiction of her laws. Property in slaves existed by virtue of her local provincial American laws; and in this treaty she claimed that the status of the slave

[3] Trans. in Documents relating to Colonial N. Y., gathered abroad by their compiler, vol. x., 210.

[4] The seals of these four Huron tribes are gotesque, yet they indicate the rude origin of the nation and its solemn emblem of power.

as imposed by virtue of those laws followed the slave and adhered to him after he passed beyond their jurisdiction and power; in other words, "once a slave always a slave."

As I have pointed out in another monograph,[5] the legality of slave property, even when carried beyond the territorial limits of the United States, and of course thus outside of the municipal law which created it, was fully recognized under the Confederation. Both the legislative and the executive treated such property as an article of merchandise differing as to its property nature from no other valuable article. "Negroes and other property of American inhabitants" were put upon the same footing in the treaty of 1783 with Great Britain.[6] So in the treaty of Ghent in 1814[7] we claimed confiscated slaves and those that had gone to the enemy, as the property of American citizens; and finally, after arbitration, these slaves, long after they were beyond the limits of the slave States and beyond the geographical limits of the United States, were adjudged to be valuable legal property, and England, in 1827, paid one million two hundred and sixty dollars for this slave property.[8] Other conspicuous instances wherein the executive and political departments of this government enforced the rights of slave property beyond the municipal regulations of a slave State, are the incidents of the Comet, 1833, and the Ecomium in 1834. These were slave ships engaged in carrying slaves from the District of Columbia to a Southern port, and that were driven beyond the jurisdiction of the United States by stress of weather, and whose slaves were landed upon British territory. The local British authorities insisted on declaring the slaves free and on maintaining them in that freedom. But Congress by resolution practically unopposed declared that the rights of property still adhered to these negroes, and the executive compelled the British Govern-

[5] Northern Rebellion and Southern Secession, p. 4.

[6] American State Papers: Foreign Relations, vol. 1, p. 190; John Q. Adams, Works. (Boston, 1850) v. 3, 336 v. 9. 632.

[7] Amer. St. Papers: F. R., v. 4, 106.

[8] Ib. v. 3, 750; vol. 4, 106, 363, 402, 645: Benton's Thirty Years' View, v. 1; 90-1.

ment to make compensation for this property, which, having been scattered, it could not restore specifically, and full "value of the slaves was paid to the United States to be paid to their owners."[9] Northern men led the negotiations in these cases. Under what municipal law did the property rights in these slaves originate and exist or find sanction? *By virtue of the Constitution of the United States alone,*—for many of these slaves were from the District of Columbia, and the District was then as now under the exclusive and plenary control of the Federal Government. Congress often recognized the property rights adhering in slaves, and those other than runaways, too, when the slaves had been carried beyond the limits of the State the laws of which created the slave property.[10] Congress, in April, 1862, voted a payment of one million dollars for the slaves belonging to the citizens of the District of Columbia, and which were held by virtue of the Constitution of the United States.[11] This legislation was by Northern Republicans, and was a measure that had been proposed by Lincoln himself while a member of Congress.[12]

That the Constitution of the United States recognized the *property* in a slave, and protected the master's right while that property remained in a Territory, had received important judicial recognition before the decision of the Dred Scott Case. Both the political and judicial branches of this government had recognized the slave-property-protecting nature of the Federal Constitution when the two came together in a Territory, thus giving the weightiest precedents for the Dred Scott decision upon this branch of the case.

In the first constitution of the State of California, and in her early laws pursuant thereto, provision was made for prohibiting slavery under State rule; but at the same time

[9] Benton, v. 2, 182-3.

[10] For instance, see Repts., Com. 36, Cong. 1st sess., No. 471. p. 1-15; Cong. Glob, April, 1862.

[11] For an interesting examination of the laws of the District regulating slaves, authorizing the sale of slaves, etc., pursuant to Federal authority, see William Jay, "A View of the Action of the Federal Government in Behalf of Slavery" (1833).

[12] Bell, Letters and Addresses of Lincoln, 360.

the legality of the slave property brought to her territory prior to her admission as a State, was recognized and provision for the preservation of such property rights was made. In October, 1852, some negroes who had been carried from a slave State to California during her territorial existence, were arrested for removal. For several months prior to the arrest these negroes had been in business for themselves. Their case came before the supreme court of the State on a writ of habeas corpus. There was nothing to embarrass the questions involved. Did the Constitution of the United States extend to the Territory of California during its territorial existence; and if so, did it preserve and protect property in slaves?

Concurring with the opinion of the court, which remanded the negroes to their former slavery, Mr. Justice Alexander Anderson said:

"The institution of slavery in the United States is both political and municipal. . . . Slaves were recognized by the Constitution of the United States as property, and protected; . . . It is appropriate to repeat, that the political character of the institution of slavery goes with the extent of the national territory wherever that is; and the constitutional rights and eminency of the Republic prevail at the moment of the accession of new territory. Congress may modify the forms in which it shall be exercised, and regarded; but this must be '*sub modo*,' pursuant to that instrument itself. . . The property here brought into question is that of slaves. The Constitution of the United States was in full force here.[13] Slaves were as much recognized by that as property, as any other objects whatever. . . .

"When the United States acquired the Territory of California, it became the common property of all the people of all the States, and the right of emigration of every species of property belonging to the citizen was inherent with its use and possession. By the fifth article of the amendments of the Con-

[13] See in Richardson's Messages and Papers Buchanan, Secretary of State, Oct. 7, 1848, to Voories, a Government official, saying the Constitution was extended over California May 30, 1848, on the day of the treaty with Mexico.

stitution, it is expressly provided 'that no person shall be deprived of his property without due process of law. . . . ;' these negroes, therefore, being property as before shown when brought into California [which was before she became a State] so remained. . . .

"It was the vast and unexampled discovery of gold which brought together an excited population. The man of the North came with his capital in the shape of bales of goods—he of the South sometimes with his slaves. The course of the argument now made finds equal authority and protection for both, under the broad shield of the common Constitution; and that the property of neither can be taken by a surprise, or a strategy, nor without just compensation, and that both had equal rights to come to this golden and sunny land."[14]

The most interesting of the cases relied upon by the California court is that of the United States vs. the Armistad,[15] where, again, Mr. Justice Story, that uncompromising foe to slavery, delivered the opinion of the court.

The Spanish schooner, Armistad, in June, 1831, was carrying negroes recently kidnapped from Africa, from one port in Cuba, a Spanish possession, to another port in the same country. The slaves rose in revolt, slew the captain, and spared the lives of the two other Spaniards, who claimed to be their masters, on condition that they would navigate the ship—the negroes being entirely ignorant of navigation—to Africa or some other country where slavery was not legal. But the Spaniards, Ruiz and Montez, deceived the negroes and sailed for the United States, landing off the coast of New York. United States officers, perceiving the vessel was in distress, being in the power of a dangerous and insurrectionary number of negroes, took possession of her and the negroes, and landed them. Proceedings were instituted in the United States courts, the officers claiming pay for assisting the vessel in its need, and the Spaniards claiming as slave the negroes, asking that

[14] *In re* Perkins, 2 Hepburn's Calif. R. 452, 455, 459.

[15] 15 Peters, 590-3.

they be delivered to them as their property; while the negroes asserted a right to freedom, claiming to have been free-born men recently kidnapped from Africa.

Under our treaty provisions with Spain, we were under obligations to protect Spanish *property,* without special mention of slave property, which temporarily and with no intent to violate our laws came within our jurisdiction. Said Mr. Justice Story, delivering the opinion of the court: "If these negroes were, at the time, lawfully held as slaves under the laws of Spain, and recognized by the laws as property capable of being lawfully bought and sold; we see no reason why they may not justly be deemed within the intent of the treaty, to be included under the denomination of merchandise, and, as such, ought to be restored to the claimants; for, upon that point, the laws of Spain would seem to furnish the proper rule of interpretation."

The court then gives judgment that the negroes be remanded to their Spanish owners, to be carried out of the United States because the word property comprehended negro slaves just as any other "denomination of merchandise," the Spanish slave law following to the "free" State.

After the free laws of Pennsylvania had become operative Major Sevier, a son of the historic General Sevier, carried to Philadelphia from his home in a Territory, that section which is now the State of Tennessee, some negro slaves, and retained them in Pennsylvania for a number of years. These slaves were property by virtue of the laws of the Southwest Territory. Unless they were property by virtue of the Constitution of the United States, since a Territory derives all of its legislative authority from that instrument, plainly they were not property. Sevier, having exercised ownership over the negroes while in Pennsylvania just as had Emerson over Scott while outside of Missouri, proposed to carry this property back to his home. The negroes refused to go and appealed to the courts, insisting that the Pennsylvania anti-slavery law had destroyed the property right. The questions which presented

themselves to the court were patent: Were these negroes property under and by virtue of the laws of the Territory? If so, did that property right follow them to Pennsylvania and adhere to them while they remained there? The case finally reached the supreme court of the State, and in 1795 the court adjudged the slaves to be property, and remanded them to their master who returned them to his home in the Southwest Territory.[16]

"Being property when brought into" the Territory sought to be affected by the Missouri Compromise, "Dred Scott and his family so remained," said the Supreme Court of the United States, because, as the California and the Pennsylvania courts held, slaves were as much recognized by the Federal Constitution as property as "any other objects whatsoever."

During our war with the Seminoles in Florida, in 1837 and 1838, a large number of those Indians were emigrated west of the Mississippi river. They carried with them a "considerable number of negroes, who had been claimed and lawfully held as slaves by Indians of the tribe," the attorney-general for the United States tells us. At its expense the government moved both the Indians and their "*property* of great intrinsic value," and settled the tribe in the Western Territory. There the negroes continued "in the possession and service of their Indian masters" until 1846. A large number then went into the Federal fort pursuant to an offer of qualified freedom made by an officer in command of Federal troops. In June 1848 J. Y. Mason, former attorney-general and then attorney-general *ad interim*, having under consideration this case and the case of slaves that had been captured in that war both by our troops and by Indians acting as our allies, said: "The legal principles applicable to the subject appear to me to be free from difficulty. Regarded as persons, the negro slaves had no power to contract, and therefore could not enter into any treaty or convention. Regarded as property when captured, they were to be treated as any other movable property captured from an enemy in a land war. . . ." He then pointed

[16] Yates, Penn. Rep. 481.

out that our government had restored all captured slaves to their former masters where their "status *ante bellum*" was established. And in the case of the others he held that they must be returned to their former masters, saying, "I do not perceive on what principles you can interfere to deprive the Seminoles of their *property*, to give to their slaves any qualified freedom."[17]

Again in 1855 negro slave property belonging to Indians outside of the municipal regulations of any State, was recognized and protected by the Federal Government.[18] These instances are representative of the rule upon which the Federal Government acted through its legislative and executive departments concerning the property nature of slaves found within the jurisdiction of the United States and outside the jurisdiction of any State. Now let me give another interesting precedent from the judicial branch.

In the circuit court for the United States, for the district covering Massachusetts, at Boston in May, 1816, an appeal from a decision of the United States district court came before Associate Justice Joseph Story of the United States Supreme Court, and the district judge. The case is a most important judicial precedent in support of the doctrine upon the point now before us. Its facts are: Arthur Emerson of Norfolk, Virginia, owned a negro slave, Ned. In 1811, he hired Ned on board the Ann Alexandria, one Kempton, master, on a voyage first to Liverpool, England, and thence to one or more ports on the continent of Europe, and thence back to some point in the United States. "The ship safely arrived at Liverpool, and sailed from thence to Archangel, in Russia, in January, 1812, and while on the voyage, on the 5th of July following, was captured by a Danish cutter, and carried into Drontheim, in Norway" in the hope of being adjudged a prize. But the United States secured her release. In September, and before the ship was released, Kempton discharged his

[17] 4 Opinion of U. S. Attys.-Gen., 726, 729.

[18] Ib. v. 7, 728.

crew, and did not proceed to Archangel. But in 1813 he took a new cargo and sailed for Ireland. Landing his cargo there he went to Liverpool, and from thence sailed for the United States, and arrived at Boston in March, 1814. At Drontheim, Ned, having been discharged as no longer needed, went immediately on board the Frederick, then about to sail for London. Kempton told Coffin, the captain of the Frederick, that Ned was a slave, and asked him to make an effort to secure for the negro passage from London to the United States. At London Coffin did procure Ned passage on a vessel bound for the United States, and on board of it saw him for the last time; "but there was no positive evidence that Ned came in her, or had ever returned to the United States," though the ship arrived in New York March 29, 1813. Now Ned's master brought suit to recover the wages he was to have for the hire of Ned, and insisted that he was to be paid from the time the negro left up to the 12th of March, 1814, the date of Kempton's arrival in Boston on the return voyage. What was Ned's status? He had been in *free* territory—the English courts, and they are quoted by Judge Curtis and McLean in their dissenting opinions, say a slave becomes free in England. Now if Ned *became free* then most certainly the Virginia master could not recover his wages. The laws of Virginia either followed him fixing his status or they did not. If they did, then the master was entitled to recover the wages of his slave. There were no complications in the case. Ned was not a runaway, but was in free territory by virtue of his master's will, and for a temporary purpose, just as was Scott with Dr. Emerson—a remarkable co-incidence in *names*. If being on free soil could avoid the positive laws of slavery, then Ned was free. If free, then his master had no right to his wages after he left Virginia. That is a plain proposition. Mr. Justice Story—that uncompromising friend of the free-labor States—delivered the opinion of the court. Watch him: "The next question is as to the validity of the discharge of the *slave* at Drontheim. It is the settled rule of this court, that the

capture of a neutral ship does not of itself dissolve the contract of mariners' wages. The ultimate effect that can be attributed to it, is, that it suspends the contract, which is revived or extinguished by the ultimate acquittal or condemnation. The seamen, therefore, are not bound to quit the ship immediately upon the capture, nor can the master compel them to receive a discharge. They have a right to remain by the ship until a sentence of condemnation or acquittal has passed, or all reasonable hope of recovery is gone.

"But if with the consent of the master, they leave the ship, they are not prejudiced in their rights; and their title to wages for the previous period of the voyage will be confirmed or destroyed, according to the event of the ultimate adjudication. And such would have been the principles applicable in the present case, if the discharged mariner had possessed a legal capacity to make, and dissolve, the contract for wages. His discharge would then have been a voluntary act, and binding upon him; and as the ship was restored, his title to full wages for the antecedent term of service would have been perfect. But such a legal capacity can in no respect be attributed to him. The contract for his wages was entered into by his owner in Virginia; and must, therefore, be construed with reference to the *lex loci contractus*. In Virginia slavery is expressly recognized; and the rights founded upon it are incorporated into the whole system of the laws of the State. The owner of the slave has the utmost complete and perfect property in him. The slave may be sold or devised, or may pass by descent, in the manner as other inheritable estate. He has no civil rights or privileges. He is incapable of making or discharging a contract; and the perpetual right to his service belongs exclusively to his owner. It follows from these considerations, that the discharge of the slave at Drontheim, even with his *own* consent, was an unauthorized act, and in no respect binding upon the plaintiff [the Virginia master.] As the latter never assented to, or

ratified it, it was, as to him, a tortuous act, and draws after it all the consequences of an unjustifiable discharge."[19]

This is a representative case of the many found in our court reports. The decision was rendered by a native of Massachusetts, Judge Story, one of our most able jurists, and a man entirely unfriendly to the institution of slavery as such. This decision and the many of which it is a fair representative show that the American interpretation of the word property in its relation to the negro slave was that "the perpetual right to his services belongs exclusively to his owner" under the Constitution after he had passed beyond the laws of the State legalizing such property.

Look into the adjudications in any of the Northern States and there we find that the slave was property no matter where found, and that the rules of litigation concerning property interests in him differed in no respect from those applied to any other property. Of this fact a representative statement is found in the charge of Judge Baldwin, associate justice of the Supreme Court of the United States, to a Federal jury in 1833 in Pennsylvania, when in Johnson vs. Tompkins he said: "On a question of freedom or slavery the right is to be established by the same rules of evidence as in other contests about the right to property."[20] As authority he cited the decision of the Supreme Court of the United States which had announced the same rule[21] in 1813.

In 1871, most of the judges who decided the Dred Scott Case having disappeared from the bench, the Supreme Court in Osborne vs. Nicholson, decided, Chief Justice Chase alone dissenting: "Slavery was originally introduced into the American colonies by the mother country, and into some of them against their will and protestations. In most, if not all of them, it rested upon universally recognized custom, and there were no statutes legalizing its existence more than there were legalizing the tenure of any other species of personal proper-

[19] Emerson v. Howland et al., 1 Mason's Circuit Court Rep. 50-1.

[20] 1 Baldwin (U. S. C. C.), 577.

[21] Minnie Queen vs. Hepburn, 7 Cranch, 295.

ty. Though contrary to the law of nature, it was recognized by the law of nations. The institution of slavery has existed largely under the authority of the most enlightened nations of ancient and modern times. Wherever found, the rights of the owner have been regarded there as surrounded by the same sanctions and covered by the same protection as other property. The British government paid for the slaves carried off by its troops from this country, in the war of 1812, as they did for other private property in the same category."[22]

This opinion and decision were rendered by Justices Nelson, Swayne, Davis, Strong, Clifford, Miller, Field, and Bradley. No one can say that the institution of slavery had friends upon the bench at this time. But of those who participated in the decision and opinion the Republican party counted some very strong adherents. Justices Miller, Strong, and Bradley rendered that party an important partizan service on the Electoral Commission of 1877, which, by a narrow margin of eight Republicans to seven Democrats, declared Garfield President over Tilden in the face of some of the most disgraceful frauds and forgeries ever committed by the Republican party. So that the decision in Osborne vs. Nicholson was rendered by the greatest possible extreme of "the slave power," whatever that was, *if it ever were*. The case directly involved the nature of the property rights in slaves, as the suit was an action seeking to enforce the payment of a note executed for slaves bought March 26, 1861, in Arkansas.

Slaves being property in the sense in which any other article is property, according to this court's decision, the maker was required to pay the note. Further on in its opinion the court says: "Many cases have been decided by the highest State courts where the same questions were raised which we have been called upon to consider in this case. In very nearly all of them the contract was adjudged to be valid, and was enforced. They are too numerous to be named. The opinions in some of them are marked by great ability."

[22] 13 Wallace, 661; citing Le Louis, 2 Dodson, 250; 1 Phillmore, Law of Nations, 316; 1 Wildmore, Intern. Law, 70; Dana's Wheaton, 199; The Antelope, 10 Wheaton 67.

At the same term the court decided White vs. Hart, involving a similar question, with the additional one as to the validity of that clause in the constitution of Georgia, adopted in 1868 while the State was under the dominion of the Reconstruction acts, wherein it was declared that no court shall have jurisdiction to try or give judgment on, or enforce any debt, the consideration of which was a slave, or the hire thereof. The court, Chase dissenting, held that this provision as to such debts contracted thertofore, was void because *ex post facto* and impaired the obligation of contracts concerning property just in the same sense as if the note had been given for a horse. The court further decided that the fact that the State was under the supervision of the Federal Government under the Reconstruction acts did not alter the law of the case, because "if Congress had expressly dictated and expressly approved the provision in question, such dictation and approval would be without effect. Congress has no power to supersede the National Constitution."[23]

Though it is a digression as to the immediate point before us, I am impelled to call attention to the fact that in this case the court further decided: "As the case is disclosed on the record we entertain no doubt of the original validity of the note, nor of its validity when the decision before us [by the trial court] was made. But as that question was not raised in this case, we deem it unnecessary to remark further upon the subject."[24] Here a Republican member of the court decided the merits of questions not even raised in the case before it, although shown upon the record, and which had no immediate connection with the grounds upon which the court rested its decision: in the Dred Scott Case the court decided the merits of the questions raised in the record, *vigorously argued,* and which bore directly upon the judgment in the case. Yet ever since the Dred Scott decision especially Republicans and anti-Southern people have been shouting *"Obiter dicta!"*

[23] 13 Wallace, 649, 652.

[24] Ib. 654.

Again in 1873 in Boyce vs. Tabb[25] the Supreme Court rendered a decision sustaining the same principles as those decided in Osborne vs. Nicholson and in White vs. Hart.[26] Now notice the applicability to property rights in a Territory and under the Constitution. The institution of slavery belonged to the common law as it was recognized in the colonies at the time of our separation from England. "It rested upon universally recognized custom, and there was no statutes legalizing its existence more than there were legalizing the tenure of any other species of personal property." It "was surrounded by the same sanction and covered by the same protection as other property." It was not a peculiar class. Therefore, when the word property was used in the Constitution, it comprehended this class of property "held by the same tenure as any other species of personal property." Being thus recognized and thus protected differing in no respect whatever from other personal property, it was comprehended by and protected under, just as any other property, the fifth amendment of the Constitution which forbids Congress to destroy or take *property* without due process of law, a provision applicable in a Territory no less than in a State, for it indicates an entire absence of power in the Federal Government. An act which takes one man's property and gives it to another without just compensation, is not due process of law, decided the court in Osborne vs. Nicholson; and this is as certainly true of an act which takes one man's property and gives it to no one, without just compensation to the owner.

Turn where we may; scrutinize history before the Constitution; look in upon the convention that drafted that great charter; listen to the debates in the various gatherings when the States, zealous for the preservation and retention of every possible right, were analyzing every word of the proposed instrument to find what powers were being entrusted to any branch of the Federal Government; consider the express pur-

[25] 18 Wall. 546.

[26] See also French vs. Tumlin, 9 Fed. Cases, No. 5, 104, also decided in 1871.

pose and the actual force of the amendments made after ratification of the original draft; go to the practical contemporary constructions begun with the first moment of the Constitution and continued unbroken down to the Dred Scott decision, —constructions by Congress, by all the departments of the government including diplomatic agents and representatives from all sections of the country and at one time or another belonging to all parties, who settled our disputes with foreign countries, and by the judiciary in Federal courts or in State courts or in the Territories, adjudicating cases arising on the land or on the high seas,—and we find that *property* in slaves was *not* an exceptional class. With the decision of the court every impartial mind must agree that then, "if the Constitution recognizes the right of property of the master in a slave, and makes no distinction between that property and other property owned by a citizen; no tribunal, acting under the authority of the United States, whether it be legislative, executive, or judicial, has a right to draw such a distinction, or to deny to it the benefit of the provisions and guarantees which have been provided for the protection of private property against the encroachment of the government." Hence, in view of the fact that power to destroy or impair property rights in express terms is denied Congress, we see it could not destroy that property in a slave in a Territory or elsewhere, because the words of the prohibition "are general, and extend to the whole territory over which the Constitution gives it power to legislate, including those portions of it remaining under territorial government as well as that covered by States. It is a total absence of power everywhere within the deminion of the United States, and places the citizens of a Territory, so far as these rights are concerned, on the same footing with citizens of the States, and guards them as plainly and firmly against any inroads which the general government might attempt, under the plea of implied or incidental powers."[27]

To us of to-day the thought of property in man is repul-

[27] 19 Howard, 450-51.

sive. So it was to the vast majority of our Southern ancestors, and to the few yet living who inherited that property. But we must not forget that the South, to the preservation of the slave property of which the Federal Government was pledged, was no more responsible for her slaves than were the people of Massachusetts for hers. For commercial and party purposes the Republican party became pronounced rebels against our government. The over-conscientious in the North saw only what he believed to be the interest of the slave, entirely overlooking the interest of the white people whose property he was. This country cannot endure half slave and half free, said Lincoln, but by coercion and not by constitutional amendment it was proposed to shift the burden entirely upon the South and give the Northern white man an advantage in the Territories over the white man from the South. If the government was not what it should have been, not what the Republican party of the North thought it should have been, they had a right of revolution; but at no time had any section or party claiming allegiance, the right to repudiate and to nullify. To quote Judge Baldwin again, to visit disapproval of the government formed by all our forefathers "on those who have honestly acquired and lawfully hold property, under the guarantees and protection of the laws, is the worst of all oppression, and the rankest injustice toward our fellowmen."

Fiske says: "A majority held that Dred Scott was not a citizen of Missouri, but a thing."[28] The same logic would lead us to conclude, since a foreigner is not a citizen, he is "*but a thing.*" That a slave was property did not reduce him to the *level* of the horse. My horse and my plow are both my property. I may entirely destroy my plow, but if I mistreat my horse the law interferes. The State law has provided for the protection of the horse; the slave labor States had provided for the *humane* protection of slave property as for no other property. The horse has higher rights than the plow; the

[28] Hist. U. S. 346. Many writers make this blunder. For instance: Brice, Amer. Com., vol. 1, 263; Chancellor, A Textbook Amer. Hist., 356; Twentieth Cent. Cyc. and Dic. (1903).

slave has higher rights than the horse. That a negro of African descent whose ancestors had been American slaves was not such a person as meant by the Constitution when "citizens of different States" are authorized to sue each other in Federal courts, no more rendered such a person "but a thing," than did the decision that "citizens of different States" did not mean citizens of a Territory or of the District of Columbia; and that, therefore, such persons could not sue each other in the Federal court on the grounds of diverse citizenship.

XI.

NORTHERN NULLIFICATION AND SOUTHERN SECESSION

The Dred Scott decision is important because of its law; its reception by the North is indispensable to history because of its bearing upon the secession of the Southern States. To ignore the Northern nullification to which it gave opportunity, is to neglect one of the most important concrete justifications of the secession of 1861. Lincoln waged a bloody and aggressive war to suppress secession; secession was a defensive move to defeat the most dangerous overt nullification—Northern nullifications of the Federal Government—to be found upon the pages of history dealing with constitutional government. This Northern nullification was more destructive of what Lincoln sought to preserve than was the secession which he fought. On the pages of history as sometimes written, the nullification of South Carolina in 1832 stands gibbeted under a placard the inscription of which declares the most damnable disloyalty; while over against it the New England conspiracy against the Federal Government, is labeled as having disappeared from the *Northern States* certainly not later than 1802. Nothing could be a greater perversion of our history; no story could be less fair to the seceding States.

The vast ramifications of the "underground railroad" to which great numbers of the representative men of the North, from the seaboard New England States to the Mississippi river, subscribed, were conceived in nullification and grew to be powerful and dangerous in practicing rebellion; the "Kansas War" was a product of Northern nullification which ended in overt and bloody rebellion against our National Government; and nullification was one of the most aggressive arms

of the Northern abolitionists. All over the North the free-labor States resisted, spurned, repudiated and taught disobedience to the laws and to the Constitution. On July 14, 1851, Judge Levi Woodbury, at the time an associate justice of the United States Supreme Court, in charging a grand jury at Newport, Rhode Island, called attention to the fact that it is the citizen's imperative duty "at every hazard to sustain the laws until duly repealed," and referred to the prevalent nullification as of "such violence as to overthrow order, and, by polluting the very sanctuary of justice with anarchy and crime, strike at the root of all organized society."[1] In the same year Judge Samuel Nelson, an associate justice of the same court, whose circuit covered Vermont, Connecticut, and part of New York, said:

"It is not to be denied, that the legislation of most, if not all, of the Northern States, tending to embarrass, and, in some instances, to annul the provisions of the act of 1793 [which provided for the return of fugitive slaves], has strongly impressed our Southern brethren with the conviction that these States have resolved to throw off this constitutional obligation. They take it for granted, and it is difficult to deny the inference, that the acts reflect the general sentiment of the people on this subject; and that it must have become deep and abiding, to be sufficiently powerful to mould the legislation of the State. It is this legislation, more than occasional riotous assemblies in resistance of the law, that has forced them to the question, whether the Union, with this provision of the fundamental law rejected and condemned—a provision vital to the rights and interests of that portion, and without which the Union would never have been formed—is to them a blessing or a curse. . . . That laws exist on the statute books of most if not all of them, in conflict with the acts of Congress, and repugnant to this provision of the Constitution, is a matter of history. That the enforcement of these laws would be a virtual abrogation of the provision, is not to be denied. . . . If

[1] Writings of Levi Woodbury, vol. 2, 20 and 366.

anyone supposes that this Union can be preserved, after a material provision of the fundamental law upon which it rests is broken and thrown to the winds by one section of it—a provision in which nearly one-half of the States composing it are deeply and seriously interested—he is laboring under a delusion which the sooner he gets rid of the better."

So it was that in constantly increasing ratio as we approach the period of secession, the free-labor States through their legislative machinery made it possible and certain for their citizens to mob the Federal laws; and the fanatics, of a numerous and dangerous number, led by such men as John Brown who was abetted by such representative and prominent men as Thomas Wentworth Higginson, the more widely known Charles Sumner, the great agitator Henry Thoreau, and the distinguished political leader Governor John A. Andrew, the well-known Senator Howe, and Ralph Waldo Emerson, known to the literature where the English tongue is read or spoken, organized to mob the Southern people.[2]

No branch of the Federal Government escaped the nullifying virus that had permeated the free-labor States of the North. Accordingly when the Dred Scott decision had been handed from the Supreme Bench, disappointment and indignation seized the State machinery and created statutes and passed resolutions still more bitterly in nullification of the Federal laws. The following concrete instances are fairly representative of the conditions which confronted the South when her effort to escape the evil they engendered brought her patriots to decide that secession would be the least hurtful and most nearly right of all possible remedies.

April 17, 1857, the general assembly of Ohio passed a joint resolution "relative to the decision in the Dred Scott Case," in which she declared: "That this general assembly has observed with regret, that, in the opinion lately pronounced by Chief Justice Taney in behalf of the majority of the Supreme Court of the United States in the case of Dred Scott

[2] Ewing, Northern Rebellion and Southern Secession, 354.

against J. H. F. Sanford, occasion has been taken to promulgate extra-judicially certain doctrines concerning slavery, not less contradictory to well-known facts of history, than repugnant to the plain provisions of the Constitution, and subversive to the rights of freemen and free States.

"That in the judgment of this general assembly, every free person, born within the limits of any State in this Union, is a citizen thereof, and to deny to such person the right of sueing in the courts of the United States, in a palpable and unwarrantable violation of that sacred instrument.

"That the doctrine announced by the Chief Justice, in behalf of the majority of the court, that the Federal Constitution regards slaves as mere property, and protects the claims of masters to slaves, to the same extent, and in the same manner as the rights of owners in property, foreshadows, if it does not include the doctrine, that masters may hold slaves as property within the limits of free States, during temporary visits, or for purposes of transit, to the practical consequences of which doctrine no free State can submit with honor."

Because Ohio and other States found it incompatible with their sense of honor to submit to the *laws,* the South insisted that she could not with honor submit to the *consequences of the Northern illegality*. Ohio herself had formulated and enforced the strongest possible precedent for the Dred Scott decision. At the very time she announced her determination not to submit to the laws as interpreted by the Supreme Court, her own laws, which had been enforced with relentless inhumanity, declared that negroes, no matter whether born free or slave, "were no part of the body politic;" and at no time had she treated them as citizens either of her own State or of the United States.

This position of the general assembly of the State of Ohio, was not only the most pronounced form of nullification: it was a declaration by the State of *her right to secede.* In direct disregard of her own bitter anti-negro laws, this declaration was one of the strongest moral supports for the nullification

of the fugitive slave law that had for years made Ohio the hotbed of fugitive-slave abbettors and harborers and of slave thieves. The distinguishing difference between the American government and that of any other country in the world lies in the fact that it is based upon a written Constitution; and in the no less important truth that where there is a question as to the meaning of the instrument or of any law passed by Congress, the Supreme Court is the final determinant of that meaning and of the force and effect of that law. Except by an exercise of tyranny, the Supreme Court of the United States cannot violate the Constitution. Its interpretation of that instrument become the Constitution and is final. But final only in the sense that it is the supreme law of the land until amended by a vote of two-thirds of the States. Where the matter is of sufficient importance to demand it, the people always have a remedy against the effect of a decision by our Supreme Court by amending the Constitution. If enough States to affect an amendment do not agree therein, a dissenting minority has no escape from submission except through revolution,—and this inalienable right of revolution the Southern people believed to have been written in their ratification of the Constitution, and the synonym of the *right of secession*. Plainly there were not a sufficient number of States agreed to amend the Constitution so as to escape the force and the power of the Dred Scott decision; therefore to teach that that decision was "repugnant to the plain provisions of the Constitution, and subversive of the rights of freeman and free States," was to teach nullification. If the Northern States had a right to teach and practice nullification, no matter for what cause, the Southern States cannot be denied the equal right to declare and to treat that nullification as a destruction of the obligation of Southern allegiance. There can be no allegiance to that which has been materially altered without consent of the constitutional power. That power under the American Government lies in the action of two-thirds of the States. That must be taken as right which has been created by that Con-

stitutional power and which continues to have its assent. Too, the student must not forget that *right* in any period of the past and under environments known to him only through the medium of history cannot justly be measured by the standard of a later and more enlightened day.

Again in another resolution passed by the general assembly of Ohio, she declared:

"That the general assembly, in behalf of the people of Ohio, hereby solemnly protest against these doctrines [of the Dred Scott decision], as destructive of personal liberty, of State's rights, of Constitutional obligations, and of the Union; and, so protesting, further declare it unalterable convictions that in the Declaration of Independence the fathers of the Republic intended to assert the indestructible and equal rights of all men, without any exception or reservation whatsoever, to life, liberty, and the pursuit of happiness."[3]

How differently that resolution reads when translated in the light of the Ohio anti-negro laws.

In November, 1857, the legislature of Vermont declared:

"No. 70. Resolutions on the opinions of the United States Supreme Court in the case of Dred Scott.

"Resolved, by the Senate and House of Representatives, That the Supreme Court of the United States, being the highest judicial tribunal in the Republic, ought to be conspicuous for its wisdom, learning and dignity; that the protection of the interest and the individual rights of the subject ought to be its especial care; that any departure by any member of that court from established rules of judicial propriety is calculated to degrade the tribunal and lessen the respect with which its opinions ought to be received; that whenever any such member seeks to convert that court into a political institution, to make it an instrument to carry into effect the designs of a political party, such conduct ought to meet the emphatic and decided reprobation of the people.

"Resolved, That the opinions and views expressed by

[3] Acts of general assembly, 1857, 301.

several members of that court, comprising the its majority, upon questions not contained in the record in the Dred Scott Case, are extra judicial and political, possessing no color of authority or binding force, and that such views and opinions are wholly repudiated by the people of Vermont.

"Resolved, That Vermont re-asserts the Constitutional right of Congress to regulate slavery in the Territories of the Union, by legislative enactments; that such right is clearly conferred by the Constitution itself, and its timely exercise is indispensable to the safety and perpetuity of the Union."

At her next session of the legislature Vermont manifested even stronger determination to rebel and openly to resist the United States Government. There could be no doubt, no lawyer of authority, and no judicial body, had ever or has ever questioned that the Constitution recognized and protected the property rights existing in a fugitive slave. Our government, executive, legislative, and judicial, in all its departments, and from the earliest times down to the war between the States, recognized and enforced the property rights in negro slaves as the several laws of the various slave States defined those rights. From the time the administration of John Quincy Adams secured, in 1827 the payment by England of one million two hundred and four thousand nine hundred and sixty dollars for slaves demanded as property in our treaty of peace with that country in conclusion of the war of 1812, which slaves had been declared *property* by Alexander, Emperor of Russia, who arbitrated the dispute between this country and England,[4] on down to the case of the Comet in 1830, the Ecomium in 1834, the Enterprise in 1835, the claim of the Wiggs' heirs before Congress in 1853, and again in 1860, to April 1862 when the Northern Republicans then in Congress emancipated the *slave* property in the District of Columbia by paying the *property value* of one million dollars, the most indubitable evidence has been given that the government of the United States, *that the Constitution of the United*

[4] Am. St. Papers: Foreign Relation, v. 1, 190; Adams' Wks., vols. 3, 336, 10, 632; Am. St. Papers; v. 3, 750, v. 4, 106, 363, 402; 645.

States, did recognize "the right of property in man." But in October, 1858, Vermont coupled the constitutional fugitive slave laws with the Dred Scott decision, and in the following words announced *her right as a State to decide for herself when there had been an infraction of the governmental compact,* and actually pronounced the Federal laws unconstitutional. Her legislature said:

"Resolved, That property in slaves exists only by the positive law of force in the States creating it. The moment it passes from under the operation of those laws, it is property no longer.

"Resolved, further, by the Senate and House of Representatives, That the doctrine maintained by a majority of the judges of the Supreme Court are a dangerous usurpation of power, and have no binding authority upon Vermont, or the people of the United States."

Put that side by side with the nullification of South Carolina back in 1832, place with it the disloyalty of Ohio, and the Southern manifesto becomes innocent and harmless. Yet there are those who tell us that the Northern States abandoned the doctrine that a State might pronounce the laws of the United States Government void, shortly after the New England confederacy in 1804, and most surely soon after the resolutions of the Hartford Convention when New England refused to support the government in the war of 1812! Yet Vermont proceeded to declare further:

"Resolved, That whenever the government or the judiciary of the United States refuses or neglects to protect the citizens of each State in their lives or liberty, when in another State or Territory, it becomes the duty of the sovereign and independent States of this Union to protect their own citizens at whatever cost."[5]

For the same reason, because the Northern States had so infected the Federal Government for many years as that it *would* not protect their citizens in their lives and liberty of

[5] Resolves of the Gen. Assembly of Vt., Oct., 1858, pp. 67 and 68.

movement with constitutional and legal property, the Southern sovereign and independent States of the Union found it their duty "to protect their own citizens at whatever cost." Had Ohio, Vermont, Maine and New York as States been as honest with the South as they were quick to act upon the same grounds in their own interests, the *cost* of secession would not have been the devastating war which the North waged.

In April, 1857, a committee reporting to the legislature of Maine said: "The late decision of the Supreme Court of the United States, in the case of Dred Scott, considered in connection with the president's message, certainly looks ominous for the cause of freedom[sic], not only in Kansas, but everywhere in the United States. By this decision, no person of the African race, although he may have a skin as white, an intellect as towering and character as pure and noble as any judge upon the bench, can be a citizen of the United States, under the Constitution. . . .

"In 1857, in the case of Dred Scott, the high tribunal of the United States, the boasted land of the free and the home of the brave, utters the mandate, *let the negro with his wife and children be doomed to returnless bondage.*"

Then the legislature resolved:

"Whereas, The Supreme Court, in the recent case of Dred Scott, . . . has undertaken to pronounce an extra-judicial opinion. . . .

"Resolved, That the extra-judicial opinion of the Supreme Court of the United States, in the case of Dred Scott, is not binding, in law or in conscience, upon the government or citizens of the United States, and that it is of an import so alarming and dangerous, as to demand the instant and emphatic reprobation of the country.

"Resolved, That the independent right of each State to determine who shall be admitted to political franchise and citizenship within its own limits, is clear and indisputable, and is to be exercised without question by any other State, and that persons admitted to the rights of citizenship by any State,

are, by the plain letter of the Constitution of the United States, 'entitled to all privileges and immunities in the several States.' . . .

"Resolved, That Maine will not allow slavery within its borders, in any form under any pretense, for any time, however short, let the consequences be what they may."[6]

No stranger statement of the right of secession could have been penned.

There was a large backing in the New York legislature for the following resolutions:

"Resolved, That the Supreme Court of the United States by reason of a majority of the judges thereof having identified it with a sectarian and aggressive party, has lost the confidence and respect of the people of this State."[7]

Mr. Little, speaker of the assembly of that State, on the floor in referring to the court's decision that the Missouri Compromise was unconstitutional, said: "If this be law I place my foot upon the Constitution of the United States."[8]

Representative Northern States were not alone, acting as States, in this position of open nullification and pronounced disloyalty. The great Republican party, the party of the North and of the then West, took the position that neither the President nor the Congress of the United States was bound by the Dred Scott decision. Said Mr. Lincoln: ". . . we nevertheless do oppose that decision as a political rule, . . . which shall be binding on the members of Congress or the President to favor no measure that does not actually concur with the principles of that decision."[9]

The error to which this position would lead us was unflinchingly exposed by Mr. Justice Curtis, the same judge who dissented in the case now under consideration; but the truth was announced too late to have any weight in averting the war which had already gathered for its deadly work. When ex-

[6] Resolutions of Maine, 1857, p. 61, ch. 112.

[7] Washington *Union*, May 5, 1857.

[8] Providence (R. I.) *Post*, May 2, 1857.

[9] Bell's Lincoln, 128.

posing the illegality of Mr. Lincoln's so-called emancipation proclamation, Judge Curtis said: "If it be true that the judiciary was created to act upon the constitutional validity of laws, when they affect the rights of the citizen, it must, *a fortori,* be true that its decisions that an executive act which affects a citizen is unconstitutional, is binding upon the President; otherwise, the President is sole judge of the extent of his powers, and if he will not submit to judicial decision, there is no limit to the powers which he may practically exercise."

The principle is quite as applicable to the legislative arm of the government. If Congress and the President may persist in passing laws known to be in opposition to the decision of the Supreme Court, then there can be no settled rule of legislation, and Congress and the President can so encumber the Supreme Court as entirely to destroy its functions,—and to render useless any arm of the government is to destroy the government to which the States, or any considerable portion of the people whether considered by the geographical limits of States or otherwise, owe allegiance.

In defending President Johnson on his trial of impeachment before the Senate of the United States, Judge Curtis, of counsel for the President, said: "Do not let me be misunderstood on this subject. I am not intending to advance upon or occupy any extreme ground, because no such ground has been advanced upon or occupied by the President of the United States. He is to take care that the laws are faithfully executed. When a law has been passed through the forms of legislation, either with his assent or without his assent, it is his duty to see that that law is faithfully executed so long as nothing is required of him but ministerial action. He is not to erect himself into a judicial court, and decide that the law is unconstitutional, and that therefore he will not execute it; for, if that were done, manifestly there could be no judicial decision."[10]

[10] Life and Works of B. R. Curtis, v. 2, 364.

Hence, manifestly there could be no judicial decision if the doctrine advanced by the Republican party and the Northern States, in their effort to nullify the Dred Scott decision, was to prevail. That the result of the contention went to the most serious hurt of the South, no honest historian will deny.

In April, 1857, the negro proprietor of the Worcester (Mass.) Gymnasium, having failed *on account of his color* to get a residence, advertised for one. Commenting on this April 28th, the Providence (R. I.) *Post* says:

"Worcester . . . is the place where disunion conventions are held, and disunion is preached from pulpit to rostrum, and in the leading papers of the Republican party—Dred Scott decisions are defied and ridiculed there. Kansas treason is hatched there. The ideal negro is worshiped there. And the higher law, which knows no difference in color, is pretty nearly the only law that is recognized. But even in this city of Worcester—this headquarters of abolitionists—this grand center of treason, . . . a respectable, genteel colored man . . . can't get a tenement."

Corroborative evidence of this charge of the disunion position of these Massachusetts citizens may, for one instance of many, be seen in *The Liberator*, March 27, 1857; and another in the Washington *Union* of the same date.

The Rock Island, Illinois, *Argus*, of the Dred Scott decision said:

"No decision for a generation has created a deeper sensation throughout the country." Then pointing to the citizen's duty, it continued: "Under this view of the case the presumption and insolence of no inconsiderable portion of the partisan press seem almost incredible. Every contemptible sheet which hisses from the ruins of convert treason has found a tongue, and, true to its first great type, whispers meritricious sophisms in the ear of baser ignorance and credulity. . . . This inquisition, blind and mad as it is, which has foisted itself into the pulpit and the forum, may be soon expected to sit with veiled face, in mockery of common sense and common decency, upon

the last relic of constitutional liberty. A blow aimed at the third great branch of the government, the judiciary, is tantamount to a blow struck at the heart of all law and order."[11]

In a splendid editorial entitled "The Supremacy of the Law," the Washington *Union* of May 1, 1857, pointed to the only proper remedy where citizens are dissatisfied with laws or constitutions, and then indicated the character and wide extent of the attack upon the judiciary in these words:

"Reverting to the late decision of the Supreme Court. . . . How has it been received in those [free-labor] States? We shall not pollute our columns with the monstrous lies, the exaggerated misrepresentations, the false constructions, and unfounded conclusions to which it has given birth; much less shall we copy the vulgar ribaldry which has been poured on the heads of Chief Justice Taney and the associate justices who coincided with him in the Dred Scott decision. . . .

"Let us ask ourselves what is to be the end of all this? If the law is no longer of any force—if the Constitution is a nullity, and the solemn decisions of the Supreme Court are to be set aside by the resolutions of a State legislature—what becomes of this government of laws?"

The Springfield, Illinois, *State Register,* March 19, 1857, said:

"We did not suppose that journals that had not openly hoisted the flag of disunion would so far forget what is at least due to public decency and decorum as to assert that the solemn and deliberate judgment of the highest tribunal in our country is entitled to no more respect and moral weight than that of a majority of those congregated in a Washington bar-room, or to impugn the honesty and purity of the great constitutional lawyers who occupy the exalted positions of supreme and final judges of all matters relating to the interpretation of the Constitution and laws."[12]

The Boston *Atlas* declared that the "names of the judges

[11] Washington *Union,* April 16, 1857. See a splendid statement of the erroneous position of the opposition in this same paper for April 20, 1857.

[12] See the *Register* for March 19 and 24, 1857.

will go down with that of Arnold, the traitor;" and the Boston *Chronicle* solemnly insisted that "a majority of the court are great scoundrels."[13]

The *Eastern Argus* of Portland, Maine, quoted this from the New York *Tribune's* correspondent:

"We come at once to the expression of a firm conviction, blunt as it may seem, that the Union is not worth saving nor this government worth preserving upon the basis of the doctrine of President Buchanan's inaugural, backed by the coming Dred Scott decision of the Supreme Court." Then in a scathing rebuke of this leading Republican organ it pressed the question, "Are the people of Maine prepared to raise the standard of revolt against the Union? What in the name of reason have they suffered that they should come to the conclusion that the Union is not worth saving?"[14]

March 14, 1857, the New York *Herald* warned the North against the "treason and rebellion" of its leading Republicans; and on the 15th it indicted the New York *Tribune,* the *Evening Post,* the *Courier and Enquirer,* the Albany *Evening Journal,* the Boston *Atlas,* and other "prominent Republican journals," and pointed to the evidence that they were "brim full of the elements of sedition, treason, and insurrection."

Painfully true these allegations were, as will appear by inspecting the columns of the indicated journals.[15]

The parasite of Northern rebellion was not content with the politicians, the State officials and State legislatures, it bored deep into the Northern ministry and sapped the truth from the most influential of many New England religious periodicals. *The Eastern Argus* of Portland, Maine, March 30, 1857, says:

"We have never been disposed to believe that any very considerable portion of New England desires a dissolution

[13] New York *Herald,* March 13, 1857; *Eastern Argus,* March 16, 1857; see also splendid articles in the latter for March 17th and 24th.

[14] *Argus,* March 14; see also March 12.

[15] See the *Tribune* for April 1, April 9, and 18; March 11 and 16, 1857.

of the Union. . . . But all who read the newspapers, especially professedly religious papers, cannot fail to see that the tendency of much of their discussions is directly and immediately calculated to sow seeds of revolution and disunion. . . . For instance, there is the New York *'Independent,'* the leading organ of the Congregational denomination. It is said to have the largest circulation of any of its contemporaries, and it claims to exert a wide and more controlling influence over New England orthodoxy than any other publication. . . . It will readily be seen, then, that a paper conducted with ability, having an immense circulation, and lording it over the consciences of men with the authority for which that is proverbial, has it within its power to do immense mischief. . . . That it does make mistakes and that too of a heinous character is easily shown. Who does not revolt from such atrocious sentiments as these:

"'We affirm that Chief Justice Taney, from his high seat of power, pronounces that to be law which in his innermost soul he knows not to be law. We affirm that, deliberately, and after a winter's study, he alleges as historic fact that which he knows to be not fact.'

"Here is a charge involving the Chief Justice, against whose character there has never been a breath of suspicion, in falsifying his honor, and committing downright, *wilful* perjury. . . . Now it may be said that such ebolutions carry their own curse with them. With men of candor and independence it is so. But these are not the men on whom the mischief operates. The wrong is perpetuated on that numerous portion who take their religious paper to the family circle for Sunday reading; men who . . . treat the columns of a professedly religious periodical nearly, if not quite, as infallible as the pages of Holy Writ. . . .

"There was, a few days since, an article in the leading organ of another large denomination in New England, the direct tendency of which was to give countenance to disloyalty to the Union and the Constitution. . . . We quote from the

Boston '*Watchman and Reflector*,' the Baptist organ. In commenting on the decision of the court in the Dred Scott Case, among other things it says:

"'The decision is a sacrilege against which the blood of our fathers cried from the ground. No man that has in his veins a drop kindred to the blood that bought our liberties, can submit to this decree. But if the free States will sit down in the dust, without an effort to vindicate their sovereign rights, if the majority of the people are so fallen away from the spirit of their fathers, as to yield their birth-right without a struggle, then it becomes the solemn duty of every conscientious freeman to regard the Union of these States as stripped henceforth of all title to his willnig allegiance.'"

Many other like utterances might be given from the columns of these and many other such journals, such as the declaration by the *Independent* that the Dred Scott decision was "a treasonable attempt" to alter the law,[16] or that of a correspondent in the *Independent* of April 12:

"The decision of the Supreme Court against God's word and the Constitution of our country has no more authority upon any of us, or in any department, than the command of Satan to the Lord Jesus to fall down and worship him. . . . And it is just the most abandoned corruption and putridity of national selfishness and avarice, the very *faeces* of moral depravity on the dung hill of the world, which the Chief Justice applies in his reasoning, for the quickening into life of his moral principles."

June 27, 1857, the Detroit (Mich.) *Free Press* pointed to the persistent misrepresentations of the Dred Scott decision by the Northern ministry, indicated that the error must be wilful, and said: "Probably most of them never will read the opinion, and nine out of ten will persist in the misrepresentations they have indulged."[17] The *Democratic Standard*, Con-

[16] March 26th, 1857.

[17] See Washington City *Union*, June 4, 1857.

cord, New Hampshire, July 4, 1857, pointed to this same condition.

A representative of one of the most radical of the nullifying ministry is found in one Rev. Dr. Cheever who preached to large audiences in New York, and who charged that the Supreme Court had "boldly, unblushingly, Satanically" asserted that the negro was to be defrauded of his rights. He called upon all classes at the North to resist, and asserted that the free-labor States should and could nullify the decision. One of his sermons in full may be seen in the New York *Independent* for April 9, 1857. The New York *Tribune* says that he was listened to by large and respectable audiences, and that he and those preachers like him gave expression to a public feeling so strong that it could no longer be kept under.[18]

The annual conference of the Methodist Episcopal Church, held in Bristol, Rhode Island, April, 1857, appointed a committee on slavery which reported:

"The late decision of the Supreme Court, which nationalizes slavery and reverses previous decisions in favor of freedom as the national birth-right of all the inhabitants of our loved country, has overwhelmed us with surprise and grief, and affords additional assurance that the decisive battle of freedom is yet to be fought."[19]

Negroes of Boston remonstrated against the decision, filing their prayers for nullification before the legislature of Massachusetts. Governor John A. Andrew, then a member of that body, presented the remonstrance and made it the occasion to deliver a lengthy address in which he purported to analyze the decision, insisting that in fact the *court* had really decided nothing! In the course of this speech of abuse and misrepresentation, he says: "I quarrel with the opinion as pronounced by the Chief Justice because of its injustice to the colored race; because of its calumny upon the memory of the fathers of the Republic, and of its unendurable immor-

[18] See the *Tribune* for April 10, 1857.

[19] *The Providence Post*, May 6 and 16, 1857, and the Boston *Transcript* for May.

ality. I denounce it as unjust to the colored man. . . . The opinion declares . . . that the negro, 'having no rights which the white man was bound to respect,' was, by the necessity of his nature, excluded from the privileges of citizenship. . . . This war, made by the court for political purposes, by Presidents and by cabinets, upon colored men, is no war declared against race. It is not a war against color, nor a demonstration in the interests of white men. It is a war *against freedom.* It is a demonstration in behalf of human servitude. It is an operation commenced in the interests of slavery, *as a political power,* an anomalous political power in this Republic; and as such it becomes the American people to meet it, to denounce it, to overthrow it, if possible, at the threshold."[20]

Why inveigh to the legislature of Massachusetts? Underneath the movement is the most emphatic avowel of the doctrine that a State might nullify and render inoperative the acts and laws of the Federal Government. Andrew was to Massachusetts in influence what Hayne or Calhoun was to South Carolina. His denunciation of the legal nature and the binding force of the decision had immense influence and found extensive response. The method by which it was proposed to overthrow the decision of the court was patent in every move of the Northern nullificationists. For instance: Massachusetts removed from the probate office Judge Loring because as United States commissioner he enforced the Federal fugitive-slave law in a case where it was unquestionably applicable and his undoubted official duty. Andrew stood squarely behind this State nullification of the Federal Government. Commenting upon this action of the State and its legislative approval by Andrew and his party, *The Liberator* said: "This, then, is the work to be accomplished—to make the soil of Massachusetts as free as that of Canada or Great Britain to every fugitive slave, 'Constitution or no Constitution, Union or no Union.' We will do it!" (Ib.) January 29, 1858, Theodore

[20] See speech in full in *The Liberator,* March 26, 1858. April 7 and 21, 1892, the *New York Nation,* commended Andrew's analysis, failing to see its misrepresentations and virtually commending its nullification.

Parker in an address to a large Massachusetts audience said: "The whole policy of the Republican party must be changed. We must attack slavery—slavery in the Territories, slavery in the District, and above all, *slavery in the slave States.*" It was the doctrine advocated by S. P. Chase in 1847, it was Northern nullification grown bolder and much stronger. Said Chase: "If the courts will not overthrow it [the Democratic doctrine of the Constitution], the people will, even if it be necessary to overthrow the courts."[21] It was the same doctrine and the same defiance which Sedgwick, of New York, hurled at the South from the halls of Congress on March 26, 1860, when he said: "It must have been expected . . . that personal liberty bills would be passed, as they have been—though not half as stringent as they ought to be—to discharge the duty which every independent State owes to each of its citizens, however humble—I mean protection to their personal liberty."[22]

Thus throughout the North the States, the courts,[23] the legislatures, leaders of public sentiment, the bar, the press, the pulpit, the Republican party, the masses of the people following, taught and enforced the right of a State to nullify the laws of the Federal Government. Let the excuse be what it may, as a doctrine it was as absolutely unjustifiable and as much rebellion as any which the human mind can conceive. The machinery of the government being in the hands of the nullificationists the injured section was powerless, and the most complete subversion of material Federal powers followed.

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[21] Worden, Life of S. P. Chase, 315.

[22] App'dx Cong. Globe, 36 Cong. 1st session, 179. See also speech of Thos. B. Florence of Pennsylvania delivered in the House April 12, 1860, indicating the extensive nullification of the Dred Scott decision.

[23] An instance is given in *The Liberator,* March 19, 1858.

XII.

NULLIFICATION IN THE SOUTH.

The extensive Northern nullification of the Dred Scott decision, was one of the grounds of subsequent action by the South. To determine the value of this concrete instance upon which the South to an extent stands for an excuse and justification, it is necessary to have a correct view of the relation of the South to the doctrine.

Nullification, the act of invalidating or making void, in American politics or questions of government, is that doctrine which asserts the right of any State to declare the unconstitutionality of any United States law, though enacted in the prescribed manner and held to be constitutional by the Supreme Court of the United States, the State remaining the while unrevolted or unseceded. This definition is equally applicable to any party, section, or part of the people. The concensus of American scholarship is that this theory is wrong and entirely without foundation in our system of government. Unchecked, its practice by any number of the States, by any section of the Union, or by any part of the people, would subvert and destroy the American government; in the words of Webster in 1832: "It is disunion by force, it is secession by force: *it is civil war.*"[1]

In histories of American government and politics nullification is asscribed almost exclusively to the South, and John C. Calhoun and his friends in South Carolina in their controversy with the Federal Government in 1828-1833, over the tariff, are regarded as chief exponents. Only the merest

[1] Writings and Speeches, vol. 13, 41.

outline of the history of this doctrine in the South can here be given, but it will suggest that broader view which must attain before the true relation of the doctrine to our history can be seen. When this readjustment of our historic perspective shall have been made, the nullification of the Dred Scott decision will stand much nearer to the foreground and in outlines bold; and it will appear that the secession of the South certainly was not the climax of her faith in and practice of that contention.

To the Virginia and Kentucky resolutions of 1798 and 1799 is sometimes attributed the origin of nullification.[2] These famous resolutions were provoked by the alien and sedition laws passed by Congress shortly before. The alien law gave the President arbitrary power to expel from the United States any alien he might regard as dangerous to the peace and safety of the country. The sedition law made the printing, writing, or publishing of anything false, scandalous, or malicious against the President, Congress, or the government, or the doing of anything to bring either into disrepute or contempt on the part of the people, an offence punishable by fine and imprisonment. These acts of legislation were the peculiar work of the Federalists in Congress, who sought to gather arbitrary powers to the Federal Government. Timothy Pickering of Massachusetts, as an instance of the spirit of the Northern Federalist, expressed regret that these laws were not more radical and far-reaching. Amos Fisher led the general opposition on the part of the Federalists to John Marshall, proposed for Chief Justice of the Supreme Court of the United States, on the ground that Marshall disapproved of these laws.[3] There was no popular demands for the laws, and it was clearly the purpose of the Northern Federalist to place the States at the mercy of the Federal Government.[4] These laws excited alarm in every section of the Union. The

[2] 1 Von Holst, Const. Hist. U. S. 142; Powell, Nullification and Secession, 63 and many others.

[3] Gaillard Hunt, The Life of Madison, (1902) 250; 4 Elliot's Debates, 441; 1 Statutes at Large, 570, 596.

[4] See Thomas E. Watson, Life and Times of Jefferson, 362.

people were brought again to inquire for rights and remedies just as shortly before the colonists had been forced to do. Plainly, the alien and sedition laws were unconstitutional; they were despotic. Out of this situation sprang the Virginia and Kentucky resolutions.

The legislature of Kentucky passed its resolution in November, 1798. The following embodies the doctrine set forth: "That the several States composing the United States of America are not united on the principle of unlimited submission to their general government; . . . and that whenever the general government assumes undelegated powers, its acts are unconstitutional, void, and of no force, . . . that this government was not made the final or exclusive judge of the extent of the powers delegated to itself, since that would have made its discretion, and not the Constitution, the measure of its powers; but that as in all other cases of compact among parties having no common judge, each party has an equal right to judge for itself, as well of infractions as of the mode and measure of redress."[5]

This resolution was an address to the other States and was meant primarily as a protest against the action of the Federal Government. It does no more than assert that corrective power remains with the States and is preserved by the Constitution; and that, should the corrective power when exercised fail of the desired relief, there remained the right of revolution,—a right denied by no one. This resolution declares that the State will not submit "to undelegated and consequently unlimited powers in no man or body of men," but it does not say that the remedy lay in the nullification of the objectionable laws by the action of a single State. However, it does specifically declare "that, although this Commonwealth, as party to the Federal compact, will bow to the laws of the Union, yet it does, at the same time, declare that it will not now or hereafter cease to oppose in a constitutional manner every attempt, at what quarter soever offered, to violate that com-

[5] See Warfield, The Kentucky Resolution of 1798; 4 Elliot, 540; Smith's History of Kentucky, 346, where the resolutions are given in full.

pact."[6] The doctrine of State nullification in the objectionable sense of that word has been imputed to the resolution and to the State because the resolution declared that "a nullification by those sovereignties [the States], of all unconstitutional acts done under color of that instrument is the rightful remedy." But these words taken in connection with the entire resolution show clearly that there was no intimation that the *nullification* was to be accomplished by other than the three-fourths power of the States. In an unobjectionable sense the States have the power to nullify any act or to destroy any power of the Federal Government, under that clause of the Constitution which has reserved to the States the right and power to amend or alter the Constitution. As Shaler has said, this resolution, as is shown by previous and subsequent history of the State, was not entered as the basis of any contemplated action. "It would be a distortion of history to look upon this action as though it had been taken in 1860;"[7] or to give the word nullification the meaning not in the mind of the Kentuckians, and which the word came to have at a later day.

The Virginia resolution was passed by the legislature in December, 1798. It was formulated by James Madison, whose loyalty to the Federal Government has never been questioned. His understanding of the Constitution and his grasp upon the fundamentals of the government were inferior to none. The doctrine advocated by this resolution was that the Federal Government was bound by the "plain sense and intention" of the Constitution and that its acts are "no further valid than they are authorized by the grants enumerated" in that instrument; "and that, in case of a deliberate, palpable, and dangerous exercise of other powers, not granted by the said compact, the States who are parties thereto have the right, and are in duty bound, to interpose, for arresting the progress of the evil, and for maintaining within their respective limits the authorities, rights, and liberties appertaining to them."

[6] 4 Elliot, 545.

[7] See Shaler, History of Kentucky; Smith, History of Kentucky, 356.

As was natural this resolution was bitterly assailed by the Federalists and distorted into a doctrine its language does not warrant and which those who passed it did not entertain. So it was that at the next session of the legislature, 1799-1800, Madison made that analytical report showing that the doctrine advocated was that recognized and preserved in the Constitution. It was clearly shown that, as was the Kentucky resolution, this by Virginia was no more than a protest and a reminder to the Federal Government, pointing out that in the last resort, short of revolution, the power lay with three-fourths of the States. In the statements that " the States as sovereign parties to their compact, must ultimately decide whether it has been violated;" and "that it is evident that the interposition of the parties, in their sovereign capacity, can be called for by occasion only deeply and essentially affecting the vital principles of their political system," every fair construction in the light of contemporary history concludes that the doctrine asserted was no more than that the right of revolution lay primarily with the State organizations; and of course, should these not agree, with the people regardless of State units. Our forefathers believed that the interests of the people of each State were so common that there was little danger of State disintegration. Alexander Hamilton understood American sentiment, and in the notes made by him during the convention which drew the Constitution we find: "State governments will always have the confidence and government of the people; if they cannot be conciliated no efficient government can be established."[8]

Neither resolution proposed anything "but the necessary and proper means;"[9] and the proper means by which the "States have the right, and are in duty bound, to interpose for arresting the progress of the evil," as Madison showed when defining the Virginia resolution, was that the States should either have Congress, by two-thirds of both Houses,

[8] Hamilton's Notes, 16.

[9] 4 Elliot, 528.

propose amendments of the Constitution, or that on the application of the legislatures of two-thirds of the States there should be a convention for proposing amendments, "which, in either case," to use the words of the Constitution, "shall be valid for all intents and purposes, as part of this Constitution, when ratified by the legislatures of three-fourths of the several States, or by conventions in three-fourths thereof, as the one or the other mode may be proposed by the Congress." So Madison was correct when he said: "These several means . . . were all constitutionally opened for consideration,"[10] for they were plainly left to the States by the fifth article of the Constitution as we yet have it in force and as it was originally ratified.

It is not surprising, therefore, that Webster, when he came to denounce the seditious and dangerous nullification of Federal laws and acts should frankly have admitted the true nature of the Virginia resolution. He said the resolution "is susceptible of more than one interpretation. It may mean no more than that the States may interfere by complaint and remonstrance; or by proposing to the people an alteration of the Federal Constitution. This would all be quite unobjectionable; or, it may be, that no more is meant than to assert the general right of revolution, as against all governments, in the case of intolerable oppression. This no one doubts; and this, in my opinion, is all that he who framed the resolution could have meant by it."[11]

That there was no objectionable State nullification proposed by the Virginia resolutions, aside from an interpretation of the wording, is also shown by the attitude of the people toward the obnoxious laws. The wide and general enforcement of the sedition law, against persons for the most unimportant declarations,[12] served to strengthen the fear concerning the powers thus lodged in the Federal Government. The people of Virginia were brought face to face with a

[10] 4 Elliot, 579.

[11] 10 Benton's Abridgement Cong. Debates, 434.

[12] See list in E. P. Powell, Nullification and Secession, 62.

most aggravating instance of this abuse of power in one of these judicial enforcements. In May and June, 1800, a Virginia jury sustained by the public sentiment of the entire State enforced in Richmond in the trial of James Thomas Callender, the law believed by them and the public to have been unconstitutional and seriously dangerous. The case was heard in the Federal court, Samuel Chase, a justice of the United States Supreme Court, presiding. Chase was an ardent Federalist and in hearty sympathy with the objectionable laws and warmly approved the purposes for which they had been enacted. Quick of temper, of will unbending, vindictive in disposition, he resolved to enforce the detested law with the utmost rigor. He succeeded in the most arbitrary and dictatorial manner. Callender, of Petersburg, had written, "The Prospect Before Us," a slanderous and infamous production bitterly arraigning President Adams. Indicted, arrested, and put upon trial, the prisoner was represented by William Wirt, George Hay, and P. N. Nicholas, all of whom in their lifetimes were recognized as lawyers of great ability. Chase's treatment of these distinguished attorneys was so reprehensible that it was made one of the counts in the famous impeachment procedure brought against him before the United States Senate January, 1804.[13] The judge's conduct was the very strongest illustration of the dangers feared by reason of the arbitrary powers conferred especially upon the President by the alien laws. The jury, although it had seen the gross abuse of power by the presiding judge, although it believed the law under which it was proceeding was unconstitutional and dangerous to individuals, to the State and to the country, being sustained in this conviction by the opinion of the entire people, found Callender guilty. No attempt was made to rescue the prisoner; no voice arose to denounce the judiciary. Monroe, writing to Madison June 4, 1800, of this trial says: "The conduct of the people on this occasion was exemplary, and does them the highest honor. They seemed aware the

[13] The Trial of Samuel Chase, (Washington, 1805) 5.

crisis demanded of them a proof of their respect for law and order, and resolved to show they were equal to it."[14] Then very correctly he adds that everything connected with the case went to provoke a different conduct.[15]

In short, the *res gestae* of the Virginia and the Kentucky resolutions prove that the people neither suggested nor contemplated the nullification of the Federal laws by the action of a State or by that of any number of the States in any other than the manner provided by the Constitution. Whether the people were correct in saying that the sovereign States were parties to a compact, and that the Constitution was the compact between them as parties on one side and the Federal Government on the other, or that the States were the independent sovereigns contracting each with the other, it is certain that the main point is not altered: for in the last resort three-fourths of the States wield sovereign and supreme power over the Federal Government. At any rate, no attempt at an exercise of nullification in the dangerous sense is attributed to the South or any part of it until 1831. Askley brings the indictment against the State of Georgia in her controversy regarding certain Indiana lands.[16] We cannot here examine this indifferent alleged instance; but it is proper to direct attention to the many real and flagrant instances found in the North up to this time, and which are generally neglected by writers.

Up to 1832 no practice of nullification was indulged by the South. It was not advocated by any representative number, and not until seriously injured by Federal power by even the few. The first important discussion of the doctrine in Congress is found in the celebrated debate between Webster and Hayne, the latter of South Carolina. Hayne is often regarded as an early champion of that which Webster fought so bitterly: "The right of a State to annul a law of Congress or any act of the Federal Government." In the debate Web-

[14] 4 Writings of Madison, 413, n.

[15] An interesting account of the trial is in Howison's History of Virginia, (Richmond, 1845) 378 et seq.

[16] R. L. Ashley, The American Fed. State, (1902) 144.

ster drew his own inferences from what Hayne said, and then proceeded to batter what he insisted was the conclusion from the position which he thus imputed to Hayne, rather than what Hayne had really argued. Webster's speeches are published more widely than are Hayne's, and so Hayne's true contention is not always understood. Much of Webster's fight was made against the doctrine that the Constitution is a compact, made by and between sovereign and independent States, questions entirely foreign to an inquiry concerning the powers the States actually have under the Constitution in reference to or over that instrument and the Federal Government.

The debate took place in the Senate in 1830. It was precipitated by Webster, and had the Foote resolution as its immediate cause and not the remonstrance of South Carolina against the tariff. The resolution had not even a remote bearing upon nullification. It involved a mere temporary suspension of the sale of public lands. January 19, the resolution having been called up, Hayne arose and recommended "some fixed and settled policy with reference to the public lands," disapproving the prior course of the government in this respect, and deprecated the building of an immense Federal fund from land sales. In his remarks he said: "Sir, I am one of those who believe that the very life of our system is in the independence of the States, and that there is no evil more to be deprecated than the consolidation of this government. It is only by a strict adherence to the limitations imposed by the Constitution on the Federal Government, that this system works well, and can answer the great ends for which it was instituted."[17]

Webster seized this reference to *consolidation,* and made the remark an excuse to deliver to certain citizens of South Carolina a rebuke for their attitude toward the Federal Government on account of the tariff laws that, in very truth, were impoverishing the State to enrich the North, and that with

[17] 10 Benton's Abridgement, 421.

no public need for the sacrifice. Webster insisted that disunion and not consolidation was the imminent danger. Though carefully exonerating Hayne, he incriminated Hayne's personal friends, most of whom were absent, except Calhoun, then Vice-President and as the presiding officer of the Senate who could not speak.

Hayne replied, defending his State and insisting that his position as to the powers of the States over the Federal Government was that expressed by the Virginia resolution. Except in so far as he advocated the right of a State to suspend the operation of an objectionable law until three-fourths of the States could take some action, he did not advocate nullification. He plainly said that where a State and the Federal Government were in conflict as to the constitutionality of a Federal law, the mode of settling the disagreement was found in the very form and structure of the government. "The creating power is three-fourths of the States. By their decision the parties to the compact have agreed to be bound, even to the extent of changing the entire form of the government itself; and it follows of necessity, in case of a deliberate and settled difference of opinion between the parties to the compact as to the extent of the powers of either resort must be had to their common superior—that power which may give any character to the Constitution they may think proper—viz: three-fourths of the States," was the plain language in which he defined his contention.[18]

Entirely regardless of whether the States be parties and the Constitution a compact, it is certain that the nullification which Hayne advocated in this debate with Webster was quite different to that practiced by the North with reference to various Federal laws, and widely unlike that especially advocated concerning the Dred Scott decision.

In 1832 a large part of the people of South Carolina grew desperate. Congress had not heeded their prayers for relief, and they believed themselves to be seriously injured by the

[18] Ib. 443, 445. See 4 Elliot, Debates, 515.

sectional tariff laws. They insisted that the tariff laws were an "imposition laid, not by the representatives of those who paid the tax, but by the representatives of those who are to receive the bounty." The legislature, following a bitter contest over the election of members, called a convention of the people to meet in November, 1832, authorizing it to take into consideration the tariff laws and to take such steps as should be decided to be proper.[19] The convention promptly convened and after discussion passed an ordinance declaring the tariff laws "unconstitutional, and therefore absolutely void, and of no binding force within the limits of this State." The legislature was requested to provide for carrying into execution this declaration, and "all the functionaries and all the citizens of the State, on their allegiance," were enjoined to coöperate. The legislature at its following session put the State in readiness for war, and made every preparation to carry into full force the ordinance if necessary at the point of the bayonet. Calhoun, having resigned the Vice-Presidency, had been sent to the United States Senate where he could take open issue with those regarded as the enemies of the State. Hayne went home and was by the nullificationists elected governor. The entire action of both the convention and the legislature was nullification and more; it was in effect revolution by the State backed by threatened secession. The ordinance of nullification declared that should the Federal Government attempt to enforce the laws regarded as injurious the people would "thenceforth hold themselves absolved from all further obligation to maintain or preserve their political connection with the people of the other States, and will forthwith proceed to organize a separate government, and do all other acts and things which sovereign and independent States may of right do." December 29, 1832, the legislature having passed an act for the enforcement of the will of the convention, President Jackson indicated his determination to enforce the Federal law, but the State held stubbornly to her position until Clay came forward

[19] *Southern Patriot* (Charleston, S. C.), October 26, 1832; Acts of Legislature.

with his compromise tariff law and thus averted armed conflict. Jackson's message to Congress refuting the doctrine is recognized as one among the ablest of state papers.[20] The law enacted, practically that proposed by Clay, provided for the gradual scaling down of the high tariff duties until at the end of ten years a free-trade basis should be reached. Accepting the compromise the State convention on March 16, 1833, repealed the ordinance of nullification.

Entirely apart from the grounds upon which the nullificationists of South Carolina acted, we are here concerned alone with the extent that the doctrine and the movement met the approval of the South. If nullification were the doctrine of the South, then there could be no justice in the complaint of that section against the nullification of the Dred Scott decision. The nullification of the Federal laws by the North, including as many which did not involve slavery as which did, as has been said, and the fact that the machinery of the government was in the hands of the nullifiers and those who were either in tacit or open sympathy with them, are among the concrete justifications upon which the secession of the South rests. Therefore the truth of the South's relation to the nullification of South Carolina, is most vital to the Southern people. This is the more true because this act of the State of South Carolina is the only actual and flagrant instance of nullification in the objectionable sense of the doctrine to be found in Southern history.

In the election of the legislature which called the nullification convention in South Carolina there was a stubborn fight against the doctrine. The vote stood about 17,000 anti-nullifiers to about 23,000 nullifiers.[21] Even the nullificationists had not rushed into an exercise of the doctrine. For years they had asked for relief, and had resorted to divers remedies,

[20] See the message in 2 Richardson's Message and Papers of the Presidents, 610, and the Proclamation at page 640. As to the action of the State see *The* (Charleston) *Mercury*, January 5, 1833; *The Patriot*, November 24, 1832; and State Papers on Nullification, for the ordinance in full.

[21] De Bow, Political Annals of South Carolina, (1845) 39; 1 Legaré, Writings, 209; Houston, Nullification in South Carolina, 107.

such as discarding imported goods and actually wearing homespuns.[22] After the ordinance of nullification had been passed and Jackson had signified his intention of enforcing the laws of the Federal Government, the Union men of the State organized and notified the President that no outside assistance would be needed to enforce the execution of the laws,—laws detested by practically the entire State including most of these very men thus willing to sustain them as against the doctrine of nullification. In March, 1833, about 1,000 Union men volunteered for military duty and stood ready to act for the Federal Government in any emergency.[23] Some of the ablest papers of the State both before and after the nullification action took the most advanced ground in support of the Federal laws so long as the State remained in civil and political connection with the Union. Conspicuous among these was the *Southern Patriot,* published in Charleston.[24] The Unionists were not the high tariff people; the people were agreed as to the oppressive nature of the laws; the opposition to the nullifiers rested purely upon a disavowal of the doctrine of nullification.[25] The Union people recognized, in common with all civilized people, the right of revolution; and, as did the South generally later, believed the right to be concretely expressed by secession and to be exercised only in cases of intolerable oppression.[26] The right of political dismemberment they recognized; nullification they would not tolerate.

As a State South Carolina is responsible for the nullification of 1832. She had gone scarcely further than had such Northern States as Massachusetts and Connecticut, the governors of which flatly refused to obey the Federal law requiring soldiers for the defence of the country in our war with England in 1812, declaring the Federal Gov-

[22] Charleston *Mercury,* July 7, 12, 16, and August 4, 1828.

[23] Houston, Nullification in South Carolina, 115.

[24] See especially issues of July 19, 25, and September 15, 22, 1832.

[25] Ib. September 15, 1832.

[26] See *The Patriot,* quoting from the Augusta, Georgia, *Constitutionist,* July 19, 1832.

ernment had violated the Constitution. South Carolina occupied no ground in advance of that taken by the representatives of Rhode Island, New Hampshire, Vermont, and Massachusetts in the Hartford Convention, who issued an ordinance declaring: "In case of deliberate, dangerous, and palpable infractions of the Constitution, affecting the sovereignty of a State and the liberties of the people, it is not only the right but the duty of such State to interpose its authority for protection in the manner best calculated to secure that end. . . . Therefore, resolved, that it be and is hereby recommended to the legislatures of the States represented in this convention, to adopt all such measures as may be necessary effectually to protect the citizens of the said States from the operation and effect of all acts which have been or may be passed by the Congress of the United States; and which shall contain provisions subjecting the militia or other citizens to drafts, conscriptions, or impressments, not authorized by the Constitution of the United States."[27] To carry out this ordinance as did the one Southern State so the several in North made ready *to maintain* State nullification against the Federal Government by *war*. Yet the citizens of the State of South Carolina were far from a unit concerning the right which the nullification convention attempted to exercise, and it is seriously questionable whether the work of the convention reflected the true sentiment of a majority of the people. The saner sentiment was that expressed by a resolution of an anti-nullification convention at Columbia: "It is not a mere infraction of the Constitution which, like an external injury, leaves the general utility unimpaired, but a radical and fatal error. . . . If one State has the jurisdiction to declare a law unconstitutional every other must have the same; and the Constitution can have no settled meaning."[28]

What of the South generally or any important part?

[27] American State Papers; Miscl., volume 2, 186; 1 Richardson, Messages of the Presidents, 516. For a contemporary list of Northern nullifications see Hampden, The Genuine Book of Nullification, (Charleston, 1831).

[28] See *The Patriot*, December 12, 13, 20, and 21, 1832.

Scarcely a more opportune time or a more plausable excuse for asserting or abetting nullification could have been afforded the Southern people. Those who wrote and who sanctioned the Virginia and Kentucky resolutions were yet living. No popular change of sentiment had occurred in either State: what now of Virginia and Kentucky?

With direct reference to the action of South Carolina the legislature of Kentucky, on February 2, 1833, declared that " no State of this Union has any constitutional right or power to nullify," "contravene" or "obstruct" the laws or regulations of the United States; and that the Federal judiciary alone could "abrogate or annul" the laws of Congress; and "that so long as the present Constitution remains unaltered the legislative enactments of the constitutional authorities of the United States can only be repealed by the authorities that made them."[29] In language no less clear and certain the legislature of Virginia repudiated the doctrine, and with Kentucky again declared that in the resolutions of 1798 South Carolina found neither encouragement nor precedent. In the most emphatic manner the people of each State made it clear that nullification would not be sanctioned by them.

The South generally, as a section, took a stand side by side with Virginia and Kentucky. Not a single Southern State failed in the most positive manner to repudiate nullification and to condemn the action of the South Carolina nullifiers.[30] The legislature of North Carolina affirmed "that the doctrine of nullification declared by South Carolina . . . is revolutionary in its character, will in its operation be subversive of the Constitution of the United States, and lead to a dissolution of the Union." Said the Richmond, Virginia, *Enquirer*: "Let us hope for the best. This Union must be preserved—nullification arrested—the protective system extinguished. . . . we trust that the Southern States will continue to wage interminable war against the odious tariff, while they dissent

[29] Smith, Hist. Ky., 355.

[30] State Papers on Nullification, 101-292; Houston, Nullification in S. C., 119.

from the dangerous remedy of nullification."[31] *Such were the sentiments representative of the South.*

When Powell says: "Nullification was the watchword of a united South," he draws a hasty and unwarranted conclusion from very narrow premises.[32] Here and there local meetings encouraged the nullifiers, but such sympathy was expressed by a decided minority.[33] Small gatherings, representative of the others of their kind, in Louisiana and Georgia urged the nullifiers to perpetuate the determination of their ancestors to be "tenants of the soil or of the sod," rather than surrender, and declared that "the children of Marion, Pickney, and Hayne will not stop to calculate the cost after they have planted themselves upon the Constitution."[34] In fact, the nullifiers received far more encouragement from the North than from the South.[35] Even Thorpe admits: "The extreme nullifiers were a minority in the Democratic party at the South."[36] Not only were the nullifiers a minority,—as compared with the entire section an insignificant minority; but nullification was at no time the doctrine of the South. Secession was not nullification; secession was not the climax of the nullification doctrine. The two are as unlike as self-defense is unlike murder.

The contrast is not difficult to see. The two sections of the Union differed upon questions most vital to the American government. As the period of the war between the States drew rapidly on, nullification became the watchword of a united North. It became evident that coercion impended the one side or the other. Buchanan said in his inaugural address that the question of the power of Congress over slave property in a Territory "is a judicial question which legitimately belongs to the Supreme Court of the United States, before whom

[31] See also *The Patriot*, Dec. 13.

[32] Nullification and Secession, 267.

[33] *The Mecury*, Jan. 11, 1833.

[34] Ib. January 4.

[35] *The Mecury*, January 9, 1833.

[36] Const. Hist. U. S., vol. 2, 405, n. 2.

it is now pending, and will, it is understood, be speedily and finally settled. To their decision, in common with all good citizens, I shall cheerfully submit, whatever this may be."[37] Some say this indicated that "the slave power," as Alex. H. Stephens, Reverdy Johnson and other leaders of the South are unjustly called by some writers, had improperly importuned the Supreme Court to decide the constitutionality of the Missouri Compromise; and that this "power" had adroitly and illegally influenced the court by means "well calculated to disturb their judgment." But as against such statements the facts are that there is no more ground for them than that similar influences were brought to bear upon the court by the Republicans, or the anti-Southern people, or the anti-negro party.

Judge McLean on November 2, 1855, wrote to a political friend, in reference to the Dred Scott Case: "The Supreme Court has decided that slavery exists by virtue of the municipal law, and is local. The Constitution gives Congress no power to institute slavery; therefore there can be no slavery in the Territories; for there is no power but Congress which can legislate for the Territories. . . . I write to you in confidence. . . . It is better that my opinions should find their way to the public from the bench."[38] Thus we have the written evidence that at least one of the members of the court gave the Republican party an intimation of what might be expected and an absolute assurance of what his opinion would be. Too, this was while the case was pending.

In his speech at Galena, Illinois, August 1, 1856, just shortly before the Dred Scott Case was argued the last time, speaking directly of the constitutionality of the Missouri Compromise, Lincoln said: "I grant you that an unconstitutional act is not law; but I do not ask you and will not take your construction of the Constitution. The Supreme Court of the United States is the tribunal to decide such a question, and

[37] 5 Richardson, Mes. and Papers of the Pres., 431.

[38] Bibliotheca Sacra, Oct., 1899, 339.

we will submit to its decisions; and if you do also, there will be an end of the matter. Will you? If not, who are the disunionists—you or we?"[39] Lincoln said no less than Buchanan. We know the Republicans had the assurance of Judge McLean, and if such is of the weight ascribed to much less evidence regarding the Southern influence, certainly the anti-Southern people had adroitly *attempted* to influence the judges "by persuasion well calculated to disturb their judgment." Having failed, the court having declared their construction of the Constitution wrong, having refused to submit, by Lincoln's measure *who were the disunionists?*

In truth, up to the very moment of defeat the ranks and the leaders of the anti-Southern party were ardent in swearing loyalty to whatsoever decision of the Dred Scott Case the Supreme Court might reach. For years the laws of Congress boastfully had been nullified to the serious hurt of the South by a rebellious North. The machinery of the Federal Government, that part specially charged with the execution of these laws and the enforcement of the Constitution, fell into the hands of the Northern party. Congress, as late as January, 1861, admitted the prevalent nullification, but proposed no substantial remedy.[40] (Having lost the decision which they themselves sought from the court, the situation in connection with the blind storm of repudiation, nullification and denunciation which sprang with a murderous roar from the erstwhile submissionists clearly demonstrated the fixed determination of the North to coerce the South and to continue the subversion of the Federal Government.)

[39] Bell, Letters and Addresses of Lincoln, 93.

[40] Ho. Committee Rept. No. 31, p. 9:36 Cong., 2nd sess.

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